degrees and forty minutes of latitude, and crosseth over thence in a straight line to Hudson's river, in forty-one degrees of latitude, which said tract of land is hereafter to be called by the name or names of New Caesarea or New Jersey. And also, all rivers, mines, minerals, woods, fishings, hawkings, huntings, and fowlings, and all other royalties, profits, commodities, and hereditaments whatsoever, to the said lands and premises belonging, or in anywise appertaining, with their and every of their appertenances, in as full and ample manner as the same is granted to the said Duke of York by the before recited letters patent; and all the estate, right, title, interest, benefit, advantage, claim, and demand of the said James, Duke of York, of, in, and to the same, or any part and parcel thereof; and reversion and reversions, remainder and remainders, thereof."

Under this deed, John Lord Berkeley, and Sir George Carteret, entered into possession of the premises, and colonized the State.

Up to the time of the grant, and for some time after New Jersey was in possession of the Dutch, who held New York and New Jersey, under the title of *New* Netherland.

† Colonel Richard Nicolls, Sir Robert Carr, and Samuel Meverick, were sent out with a fleet, to put the Duke of York in possession. Nicolls's commission bears date April 2, 1664.

In September, 1664, the Dutch surrendered New York to Nicolls, and on October 1, 1664, New Castle, and all the possessions of the Dutch and Swedes on Delaware bay and river, to Sir Robert Carr, who entered the Delaware with his ships.

In the summer of 1665, Captain Philip Carteret, who was the first proprietary Governor of New Jersey, ar-

† Proud's History of Pennsylvania, and Smith's History of New York, and Smith's History of New Jersey, passim.

rived with several settlers, who received grants under Berkeley and Carteret, and began the first English settlement of New Jersey.

In 1672, New York surrendered to the Dutch, who, under Commodores Cornelius Everye and Jacob Benkes, conquered the fort at New York.

*The people of New Jersey sent deputies to New York, and swore allegiance to the States General and the Prince of Orange, and the Governor of the Duke of York returned to England.

On the 9th of February, 1674, the treaty of peace between England and the States General was signed at Westminster, by which New York and New Jersey where restored to the English.

In order to remove all doubts as to the will of the Duke of York and his grantees, by reason of the conquest from and by the Dutch, and cession made by the Dutch to the English, by the treaty of the 9th of February, 1674, †King Charles II, by letters patent, dated June 29, 1674, granted to the Duke of York the State of New Jersey in the same manner, and by the same description, as he had previously granted the same. ‡Previous, however, to this patent, King Charles II, by letters dated June 13, 1674, acknowledged the rights of the proprietors of New Jersey, and their powers of government.

On the 29th July, 1674, the Duke of York, by deed of that granted, &c. to Sir George Carteret, East New Jersey, in the same manner as before granted to John Lord Berkeley and Sir George Carteret. §On the 18th of March, 1673, John Lord Berkeley conveyed his moiety of New Jersey to John Fenwick.

*Leaming and Spicer, 50.
†Ibid. 41.
‡Ibid. 49.
§Ibid. 64.

[6]

¶By deeds dated Feb ary 9, 1674, and February 10, 1674, Edward Byllinge, William Penn, Gawn Lawry, and Nicholas Lucas, became seised of John Fenwick's moiety.

By deed of division, bearing date July 1, 1676, New Jersey was divided into East and West New Jersey; East New Jersey being allotted to Sir George Carteret, and West New Jersey to Edward Byllinge, William Penn, Gawn Lawry, and Nicholas Lucas.

On 7th November, 1743, the council of proprietors of West New Jersey, by warrant of that date, directed *their* surveyor general to survey, to Samuel Atkinson and wife, six hundred acres of unappropriated land any where in the western division of New Jersey, below the falls at Trenton.

April 6, 1744, Samuel Atkinson and wife conveyed the whole of the said warrant to John Robbins, by deed of that date.

October 6, 1784, Elias Robbins, eldest son and heir at law of John Robbins, conveyed to Edward Hall fifty-two and a half acres, and half a tenth of said warrant.

August 7, 1782, the council of proprietors of West New Jersey, by warrant of that date, directed their surveyor general to survey to Daniel Ellis 5,000 acres of unappropriated land any where in the western division of New Jersey.

Daniel Ellis, by deed dated August 8, 1783, conveyed to John Lawrence 600 acres of said warrant.

September 1, 1784, John Lawrence conveyed to Clement Hall and Edward Hall 126 acres of said warrant.

By virtue of the above warrants, on the 8th October, 1784, Edward Hall and Clement Hall caused a survey to be made on the island in the river Delaware, in the county

¶ Ibid. 65.

of Salem, in New Jersey, called the Pea Patch, thus described:

An island in the river Delaware, called the Pea Patch, situate in the county of Salem, about one mile west from Ferr's point, in Penn's Neck, and is about west of the mouth of Salem Creek, and a little above Reedy point; also nearly southeast and by east from Hamburgh about two and a half miles, and about south one and a half point west from the Tile house at New Castle, distant about four and a quarter miles, and bounded, &c. containing 178 acres of marsh land, bank, and mud flats, and allowance for roads.

The survey was made by Elnathan Davis, a deputy surveyor of the surveyor general, and the return is dated October 27, 1784.

On the 3d November, 1784, it was approved by the board of proprietors, and ordered to be recorded, and recorded accordingly.

This deduction of title is perfect, according to the laws of New Jersey, and vests in the said Edward Hall and Clement Hall all the title derived from the grant made by the King to the Duke of York in the premises in question.

Edward Hall and Clement Hall entered on the island at the time of the survey, and it was staked out, and they took possession as far as it was capable of possession.

The Pea Patch is an island which has arisen within memory. It appeared first about sixty or seventy years ago, and arose from the sinking of a vessel loaded with peas, and thus acquired its name. By gradual alluvions and deposites, it has assumed its present state.

Shortly after the survey, the Halls rented the island to one John Mugway, for twelve dollars and fifty cents, or fifty muskrat skins, per annum, and he paid rent for two years.

The Halls possessed the island during the lifetime of Clement Hall.

[8]

In December term, 1811, the administrators of Clement Hall applied to the orphans' court of the county of Salem for the sale of his real estate, and the said court decreed the Pea Patch to be sold.

The moiety of Clement Hall was sold accordingly, and purchased by Henry Gale for $500: and on the 27th February, 1813, the administrators of Clement Hall conveyed, by deed, to the said Henry Gale, the one moiety of the Pea Patch.

On the 27th February, 1813, Edward Hall and wife conveyed the other moiety of the Pea Patch to the said Henry Gale, by deed of that date.

Doctor Henry Gale went immediately into possession, cleared a fishery on the island, and occupied it during the fishing season for two years, and until he was expelled by force by the United States, who took possession under a grant from the State of Delaware.

No possession had ever been taken of this island until the United States forcibly entered, except by Doctor Gale and those under whom he claimed. Neither the State of Delaware, nor any other claiming under it, or adverse to the New Jersey claim, had any possession of the island, from its first formation until the United States entered.

This island lies ten or twelve chains nearer to the Jersey shore than to the Delaware shore: and the ship channel or main channel runs between the Pea Patch and the Delaware shore.

* The State of New Jersey, by an act passed on the 24th November, 1831, entitled, "An act vesting in Henry Gale, his heirs and assigns, all the right and title of the State of New Jersey, of, in, and to an island called the Pea Patch, in the river Delaware, in the county of Salem and State of New Jersey," for the consideration therein mentioned, granted and conveyed all the right and title of

* Harrison's Compilation N. J. Laws, 366.

the said State to the said Henry Gale, his heirs and assigns forever, in as full and ample manner as the said State hath right and title to grant and convey the same, reserving the right of jurisdiction and sovereignty.

From the above deduction of title, it is obvious, that if the grant made by the King to the Duke of York passed any interest in the river Delaware, it is now vested in Doctor Henry Gale. It may be justly argued that it passed by the terms of the grant, which are as comprehensive as can be well imagined.

The grant made by the King to the Duke of York was for the purpose of colonization. It is true that the western boundary is thus limited, "halting upon the west Delaware bay or river," yet it is manifest that this is not designed to limit any thing more than the extent of land, for the grant goes on to pass "all rivers, mines, fishings, royalties, commodities, and profits whatsoever to the said lands and premises belonging, or in anywise appertaining."

†August 6, 1680, the Duke of York, by deed of confirmation, reciting the different grants hereinbefore stated, confirms the moiety of John Lord Berkeley and others, to William Penn and others, with all islands, bays, rivers, forts, waters, royalties, franchises, and appertenances whatsoever to the same belonging, or in anywise appertaining; as also the free use of all bays, rivers, and waters, leading into, or lying between the said premises, or any of them, in the said parts of America, for navigation, free trade, fishing, or otherwise; and also all the powers of government, as fully as they were granted by the King to the Duke of York; and, also, it is declared that the said several powers and authorities were given and granted to the Duke of York, and his assigns, by the King, for the "planting, peopling, and improving" of the lands, places, and territories, thereby granted, and for transporting

† Leaming and Spicer, 412.

thither subjects, &c., as also for the defending, guarding, and keeping the same. ‡The Duke of York, also, by deed of confirmation, dated March 14, 1682, confirmed to the grantee of Sir George Carteret, East Jersey, in a similar manner.

§On the 23d November, 1683, King Charles II confirmed these deeds.

New Jersey has always claimed and exercised jurisdiction over the Delaware bay and river.

‖In 1679 and 1680, Sir Edmund Andros, the governor of the Duke of York, of the colony of New York, which was conveyed (*inter alia* with New Jersey) to the Duke, by King Charles II, imposed a duty of ten per cent. upon all European goods imported in the Delaware, which was collected at the Hoar kills, or Lewistown; it was discontinued at the instance of the proprietors of New Jersey, who, in their remonstrance, insist that they have a right to land any where in the Delaware bay, as the bounds of the country they bought; that the right of colonizing was part of their bargain; that they bought the soil and right of government together; and that the powers of government limited them to erect no polity contrary to the laws of England; and that, with this restriction, they had the right of making laws for the good of the *adventurer* and *planter;* that if the Duke claims it by the *jure regale,* that power over the territory constituting New Jersey is vested in his *alienees.*

*In 1682, the Legislature of New Jersey resolved that the land and government of New Jersey were purchased together.

†In 1676, in the concessions and agreements of the proprietors, freeholders, and inhabitants of West New

‡ Ibid. 141.
§ Leaming and Spicer, 151.
‖ Smith's History of New Jersey, 116, &c.
* Smith's History of New Jersey, 163.
† Leaming and Spicer, 390.

Jersey, convenient portions of lands are granted for wharves, quays, and harbors; and it is declared that all the inhabitants of West New Jersey have the liberty of fishing in Delaware river.

‡In 1681, the commissioners chosen for settling and regulating lands within the province prescribe that the surveyor shall measure the lands from St. Pink creek, (Assinpink creek, at Trenton,) and from thence down to Cape May, and that each propriety should have their proportion of front to the river Delaware.

§In 1683, the Assembly of New Jersey resolved that the proprietary of Pennsylvania be treated with in reference to the rights and privileges of this province *to* or *in* the river Delaware.

‖On the 15th April, 1702, the proprietors of East and West New Jersey surrendered the powers of government to Queen Ann, which was accepted by the Queen on the 17th April, 1702.

¶In the proposals made by the proprietors of New Jersey to the Lords of the Council of Trade and Foreign plantations, (which is always considered part of the surrender,) the proprietors ** stipulate for the confirmation of the soil and lands of the province to the proprietors, and it is acceded to without objection.

††That the proprietors may be lords of the soil; and it is acceded to.

‡‡And the council say that the rights accruing to the proprietors from the seas adjacent cannot be well circumscribed.

‡ Ibid. 436.
§ Ibid. 480.
‖ Ibid. 614, &c.
¶ Ibid. 617.
** Leaming and Spicer, 589, 594.
†† Ibid. 590, 595.
‡‡ Ibid. 596.

[12]

§§As early as 1765, the Legislature of New Jersey passed an act regulating the fisheries in the river Delaware, and have continued to do so ever since.

‖‖In April, 1783, New Jersey and Pennsylvania entered into an agreement respecting the islands and jurisdiction of the Delaware, from the station point to the circular boundary of the State of Delaware, adopting, as the general principle, that the islands should belong to that State to which they lay nearest.

From a very early period, the proprietors have passed surveys of islands in the river Delaware, and all the islands in the Delaware are held under survey approved by the Council of Proprietors of West New Jersey.

There are few islands in the Delaware below the circular boundary of the State of Delaware.

Egg island and Stipson's island are the only ones, now recollected, which lie nearest the Jersey shore, and they are both held under surveys, on warrants issued by the proprietors of New Jersey.

The several sand flats which have arisen are also now held where they lie nearest to the Jersey shore, under surveys, on like warrants.

*In 1693, the Assembly of New Jersey passed an act reciting that "the whalery in Delaware bay has been in so great a measure invaded by strangers and foreigners, &c.; and enacting that all persons not residing within the precincts of this province, or within the province of Pennsylvania, who shall kill or bring on shore any whale or whales *within Delaware bay, or elsewhere within the boundaries of this government*, to pay one-tenth of the *oyl* to the Governor," &c.

§§ Allenson's N. J. Laws, 279.
‖‖ Paterson's N. J. Laws, 57.
* Learning and Spicer, 519.

On 28th November, 1822, the Legislature of New Jersey declared the *ship channel* to be the Delaware boundary of Salem, Cumberland, and Cape May counties.

†On the 7th November, 1820, the Legislature of New Jersey passed an act to appoint commissioners to meet commissioners to be appointed on the part of Delaware, to meet and conclude an agreement between New Jersey and Delaware, "defining their respective boundaries, jurisdiction, rights to islands, subaqueous soil, fisheries, and products of the river and bay of Delaware, southeastwardly of the circular boundary between the States of Delaware and Pennsylvania."

No commissioners were ever appointed by Delaware.

New Jersey made repeated efforts to induce Delaware to pass similar laws regulating the fisheries in the river Delaware, but without success.

The State of New Jersey has, and for near fifty years has had, laws regulating the fisheries in the Delaware, which assert her jurisdiction, and regulate the exercise of the right of fishing in the whole extent of the Delaware river and bay.

The right of the State of New Jersey to the island in question, it is supposed, may be defended, upon the following principles; and if the island is within the jurisdiction of New Jersey, the claim of Dr. Gale cannot be well questioned.

First. By the grant to the Duke of York, the islands in the Delaware, nearest to the shore, did or did not pass.

If they did pass, then there is an end of the question, for the Pea Patch lies on the Jersey side of the channel, and is twelve chains nearer to the shore of Jersey than Delaware.

It may be contended that it did pass, by the express terms "all the islands," &c.

† Revised Laws, 794.

[14]

1. The best expounder of the rights under those ancient and public grants for colonization and government, is the occupation and enjoyment. For more than sixty years, New Jersey has exercised an adverse dominion, under a claim of right, over the waters of the Delaware. This will bind nations, as well as individuals.—Vattel 182, s. 266-4.

2. By the terms of the grant, the Delaware is made the western boundary; it was granted expressly for colonization, and the powers of Government were granted with the soil. Upon the purchase of so large a tract as New Jersey, bounded on its whole western border by the Delaware, it would be difficult to presume that any right in that river was excluded. It was essential to the purposes of the grant, and all presumption must be in its favor.

3. The claim and holding have always been to the middle of the Delaware. Usurpation and prescription are much more necessarily used between sovereign States than individuals.—Vattel 254, s. 147.

Prescription composes a title as firm and just as that of property itself, established and supported by the same reasons.—Vattel 253, s. 141-2.

The State of New Jersey always permitted the proprietors to grant the islands and subaqueous soil of the Delaware. Her courts sanctioned the right, and it has always been acquiesced in. Penn, while proprietor, and the State of Pennsylvania, recognized that right.

Secondly. If the right to the Delaware did not pass to the proprietors, then it has never been granted. This is undoubtedly the better opinion.

*In 1721, the Attorney and Solicitor General, Robert Raymond and Philip York, gave an official opinion to the lords commissioners of trade and plantations on the

*1 Chalmer's opinions, p. 61.

question whether, by the grants of Pennsylvania and New Jersey, the river Delaware passed; that, by the said grants, "no part of the river Delaware, or the islands lying therein, passed, but the right remained to the Crown."

†This is also the opinion of Judge Washington, an opinion entitled to very great respect.

If it remained in the Crown until the treaty of peace, it was extinguished by that treaty, in which the King acknowledges the several States to be sovereign and independent, not only as to Government, but as to the propriety and territorial rights of the same. The effect of the revolution and treaty of peace was to extend the limits of New Jersey to the middle of the bay, from its mouth upwards.

‡By the general law of nations, where a river lies between two States, and is not included within the bounds of either, each holds to the middle of the stream; and the island existing or rising in the river, must be allotted to that State to which it is nearest.

I think the right of New Jersey is undeniable, if no adverse grant can be shown; none such can be shown, which has or ever had validity.

Delaware never was granted by the *King*, the only rightful grantor. If the question was *de novo*, I think that no doubt would exist that the grant under which the three lower counties of Delaware are held would be invalid. If it is good at all, it is because possession has ripened it into a title. But it can go no farther than the possession goes.

Delaware is not claimed under the grant made by King Charles II to William Penn, on the 4th of March, 1681; it is not included within the boundaries.

† 4 Peter's Circuit Court reports, p. 385-6, &c. Corfield vs. Coryell.
‡ 5 Wheat., p. 359, &c.

[16]

The only grants pretended are: 1. A deed of feoffment, August 24, 1682, by the Duke of York to William Penn, for "all that the town of New-Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying, and being upon the river Delaware, in America; and all islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of said circle of twelve miles about the said town; together with all rents, services, royalties, franchises, duties, jurisdictions, liberties, and privileges thereunto belonging." And the Duke of York, by deed of feoffment, dated August 24, 1682, granted to William Penn "all that tract of land upon Delaware river and bay, beginning twelve south from the town of New Castle, otherwise called Delaware, and entering so to the Hoar kills, otherwise called Cape Henlopen, together with the rivers, &c., situate in or belonging unto the limits and bounds aforesaid."

There is no doubt but the terms of these grants include the river Delaware. The objection is, that the Duke of York had no title whatever to the premises granted. That could only be acquired by a grant from the King; none such was ever made, or can be produced.

It is true that Colonel Nicolls, the Governor of New York, under the Duke of York, conquered Delaware from the Dutch; but that gave no title to the conquered lands to the Duke; he was then a subject, and no principle is better settled than that all conquests made by a subject enure for the benefit of the Crown.

This title, by conquest, would seem to be the one relied on by the Duke. This is confirmed by the mode of conveyance, *by deed of feoffment*, an extraordinary mode of conveying wild lands &c., and best adapted to convey a possessory right.

It may be well doubted whether *subaqueous soil*, incapable of possession, as well as rights of jurisdiction, and other rights, incapable of delivery, would pass by a deed of *feoffment*.

*In October, 1717, Edward Northey and W. Thompson, Attorney and Solicitor General, in their opinion to the lords commissioners of trade and plantations, deduce the title of William Penn to Delaware; it is manifest that they are not aware of any valid grant from the King.

†Also, in 1721, Robert Raymond and Philip York are manifestly ignorant of any valid grant of the Delaware river; and it is hardly to be supposed that not only the law offices of the Crown, but the lords commissioners of trade, &c. should be ignorant of so important a conveyance from the Crown. It is sufficient, however, to say that no such grant can be produced.

These opinions of the law officers, before referred, render it certain that none was ever made.

Then there is no valid grant from the King to any person for the river Delaware; and the right arising from the revolution and the treaty of peace, as well as the general law of nations, allots to the continguous States, respectively, the jurisdiction and propriety in the river to the middle of Delaware, from its mouth upwards.

In looking at the grant made by the Duke of York to William Penn, of New Castle and the twelve mile circle, it is obvious that it would include a considerable portion of the county of Salem, the whole of the town of Salem, and several other places then actually settled and inhabited under former grants made by the Duke of York, under title derived from the King. The several deeds of feoffment made by the Duke to William Penn being *void*, cannot be extended beyond what was actually pos-

* Chalmer's Opinions, p. 46 to 57.
† Chalmer's Opinions, p. 61.

sessed under it; and it must now be limited by that possession.

I am not aware that Delaware has ever asserted her claim to the waters of the Delaware, even to the channel, except in the cession made to the United States.

Even if there were doubts about the validity of the Delaware title, which I do not think is the case, yet I think the United States ought to compensate Dr. Gale.

When Delaware ceded the island to the United States, Dr. Gale was in possession, under a title valid if within New Jersey. The United States received a conveyance from the State of Delaware when out of possession, and upon that title forcibly ejected and dispossessed Dr. Gale, who was in possession under title derived from those who had been in possession, peaceable and undisturbed, for thirty years at least.

GARRET D. WALL,
Att'y U. S. for the district of New Jersey.

BURLINGTON, *June* 9, 1834.

APPENDIX "D."

Plaintiff's Exhibit No. 219.

Gale *v.* Beling, Charge to the Jury by Henry Baldwin, Justice of the U. S. Supreme Court, in the U. S. District Court, District of New Jersey, with letter of May 8, 1837 from James S. Green, U. S. District Attorney of the District of New Jersey, to B. F. Butler, Attorney General of the United States.

[Senate Document No. 140, 25th Congress, Second Session. Report of Secretary of War to President of the U. S. Senate, January 27, 1838, pp. 28-50.]

PRINCETON, *May* 8, 1837.

SIR: Absence from home attending the spring courts, has prevented me from answering earlier your favor of the 21st April last, in relation to the Pea Patch case. I forwarded, on the 28th of January last, to the Engineer Department, the printed state of the case, and the depositions of witnesses. There was no exception taken to the ruling of the judge during the trial, for nothing occurred to require it. As to the charge of the judge, I was satisfied with it at the time, as fair and impartial, and as presenting to the jury the whole case, both as to the law and fact. An exception, however, was taken to the charge, and noted by the judge, to secure a review, if the Government should request it, as mentioned in my letter of the 23d November last, addressed to you, as acting Secretary of War. I should have forwarded a copy of the charge of the judge, with the other proceedings, to General Gratiot; but Judge Baldwin was in Washington, attending the Supreme Court. If you request it, I will procure a copy of the charge and forward it.

After a full and laborious examination of the Pea Patch case, I have no hesitation in saying that, in my opinion, a

second trial, could the Government procure it, would result as the first.

With very great respect,
Your obedient servant,
JAMES S. GREEN,
Attorney of the U. S. for the New Jersey Dist.

Hon B. F. Butler.

Lessee of Gale, vs. Beling.

Charge of the Court.

It is to be regretted, as a precedent, that the plaintiff should have been dispossessed of the property in controversy by a military force, and that no arrangement has been made for trying the title, or any mode provided by any act of Congress for making compensation, if the property belongs to the plaintiff. The Government has an undoubted right to take private property for public use; but the obligation to make compensation in concomitant, as well by the principles of public law, as the fifth amendment to the constitution of the United States, which provides that private property shall not be taken for public use without just compensation. If the right to the island is in the plaintiff, he had his remedy, if compensation was not made, but he has not pursued it; he brings this action to try the title, which must be decided by the settled rules of law which govern the action of ejectment. It is therefore incumbent on him to show, in himself, a right of possession; not only better than the defendant, but good and perfect in itself, and better than any title in any other person, or the State of Delaware.

The possession which has been taken by the United States presents no objection to the trial of the right of possession; for should the result be favorable to the plaintiff, the United States have it in their power to take

[3]

course which will prevent any public inconvenience by the settling of the title in the suit.

Both parties claim under a grant from a State; the plaintiff under a law of New Jersey of 1831, the defendant under a law of Delaware of 1813; the former ceding to the plaintiff the right of that State to this island, the latter ceding the right of Delaware to the United States. Both of these laws have been made the subject of comment by the opposing counsel; but, without regard to their phraseology, or any technical consideration of their terms, each must be taken as the act of the State, operating as a grant of its right and title, according to the manifest intention and effect of the respective laws. In the examination of the title of the two States, we will first consider them as two independent States or nations, having the Delaware river as their common boundary.

By the law of nations, "when a nation takes possession of a country bounded by a river, she is considered as appropriating to herself the river also: consequently, the nation that first established her dominion on one of the banks of the river, is considered as being the first possessor of all that part of the river which bounds her territory. When there is a question of a very broad river, the presumption admits not of a doubt, so far at least as relates to a part of the river's breadth, and the strength of the presumption increases or diminishes in an increase ratio with the breadth of the river.

"If that nation has made any use of the river as for navigation or fishing, it is presumed, with the greater certainty, that she has resolved to appropriate the river to her own use.

"If, of two nations inhabiting the opposite banks of the river, neither party can prove that they themselves, or those whose rights they inherit, were the first settlers in those tracts, it is to be supposed that both nations came there at the same time, since neither of them can give any

reason for claiming the preference; and, in this case, the dominion of each will extend to the middle of the river. A long and undisputed possession establishes the right of nations."

Thus when, from time immemorial, a nation has, without contradiction, exercised the sovereignty upon a river which forms the boundary, nobody can dispute with that nation the supreme dominion over the river in question. (Vatt. B 1, ch. 22, sect. 1, 2, 3, 4, p. 120. Grot. B. 2, ch. 3, sect. 8, to 18, p. 162, 171. Puff. B. 4, ch. 5, sect. 3, p. 379.) The general rule cannot be so well expressed as in the words of the Supreme Court: "When a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream." (5. Wh. 379, Handlys Lee, *vs.* Anthony.)

Islands in a river belong, of course, to the proprietors of its bed.

By the middle of the river you will understand, not merely a line equidistant from each shore, but the main channel thereof, that part of the bed of the river over which there is the greatest depth of water in its general course or current; not the depth at any particular spot, but the general average depth of the channel, as indicating the main and usual route and line of navigation for large vessels.

When the river is of an equal depth, or spreads into a bay, in all parts of which the facilities of navigation are equal, the line of the States is one equally distant from the respective banks; in either case, where the main ship *channel,* or the measured distance is the boundary, islands are considered as parts of the river.

In applying the principles to the respective rights of Delaware and New Jersey to the Pea Patch, considering these States as two independent nations, settled on the

opposite banks of the Delaware river and bay, your attention will be directed to the evidence in the cause.

There has been no compact or other agreement between the States touching their boundaries; two surveyors have stated, as the result of actual measurement, that the Pea Patch is nearest the Jersey shore; a number of witnesses have testified that the main ship channel is between the Pea Patch and the Delaware shore. Some of them testify that, at the close of the revolution, a vessel drawing only six feet water was grounded in the channel, between the island and the Jersey shore. The evidence, indeed, is full and conclusive, both as to the main channel being on the western side of the island, and the island being nearest the Jersey shore; so that no question remains except on the credibility of the witnesses. It is your exclusive province to decide these facts from all the evidence in the cause, in which there is no clashing or contradiction. Should you be of opinion with the plaintiff on these two facts, then the law of the case, in this view of it, is clear.

For all purposes and objects not affected by the constitution of the United States, these States are foreign to each other. (2 Pet. 591.) They became free, sovereign, and independent States, by their own declaration of independence, which placed them severally on an equal station with the other nations of the earth, before the treaty of peace with Great Britain, which was merely a recognition, and not a grant of their independence. (4 Cr. 212.) The several States were allied sovereigns during the revolution, connected by common action in a common cause; at first, without a written league, but afterwards separate parties to articles of confederation, in which each State entered into a firm league in defence of their mutual freedom and sovereignty. (3 Art. Conf., 1 Laws United States, 14.) They were also parties to a treaty of alliance with France, who guaranteed to them their separate sovereignty and possessions. (1

[6]

Laws United States, 203.) As States, they were sovereign and completely independent, (9 Wh. 189,) to whom all the rights of the Crown of Great Britain devolved by the revolution, as well as the transcendent power of Parliament. (4 Wh. 651, 8 Wh. 584.) As a confederacy, the United States acquired nothing by the declaration of independence, or the treaty of peace. The boundaries of the United States were those of the several States. No territory was acquired that did not belong to some of the States, and none could be acquired by the confederacy within the boundaries of a State. Any acquisition at the expense of a State would have been a violation of the 3d article of the confederation, the 2d and 13th articles of the treaty with France, as well as a fundamental principle of international law, resulting from the alliance of the States with each other, and each and all with France. One party to the alliance is not permitted to acquire territory during the war, to the dismemberment of another. Each State declared itself independent, according to the limits of her territory at the time of such declaration, as claimed by her, or as asserted by Congress in the declaration of independence in behalf of all the States; and the soil and sovereignty within their acknowledged limits were as complete theirs on the 4th of July, 1776, or at their separate declarations of independence, as at this time. (12 Wh. 525, &c.) Though the people of New Jersey formed their constitution on the 3d July, 1776, and the people of Delaware formed their in September following, the former acquired no priority of claim, as to territorial boundary, or any other rights over Delaware; nor was there anything which occurred during their colonial condition, which could affect their relative sovereignty after they became States.

As colonies, or rather provinces, each was under a proprietary Government; New Jersey, by a direct grant from the King to the Duke of York, in 1664. The three lower counties were held under two deeds from the Duke of

[7]

York to William Penn, in 1682, without any direct grant from the Crown. They were united under a common government with Pennsylvania in that year, and so continued till the revolution. But, though the people of these counties had no charter from the King, as a colony, or any separate government, they were always considered as a distinct political community or body politic, on the same footing as the other colonies. As such, they were represented in the first Congress of the revolution, in September, 1774, by delegates "from the Government of the counties of New Castle, Kent, and Sussex, on the Delaware," (vide journals of Congress, 1, 2;) and in the succeeding Congress, until the 4th July, 1776, when the declaration of independence was signed by them as the representatives of the State of Delaware. She must then be taken to be a separate and sovereign State, on a footing of perfect equality with the other States, without regard to the precise time of her becoming so: and as succeeding to all the rights of the Crown and Government of Great Britain, as they existed at the revolution, in and over the Delaware river and bay, within her boundaries, or claimed limits. Such is the effect of the declaration of independence and treaty of peace, as declared by the repeated and solemn decision of the Supreme Court; and the United States neither did, or could acquire any territorial rights by the treaty of peace. The two States of Delaware and New Jersey must be considered as two foreign States or nations, having the Delaware as their common boundary. It follows, *that each held soil and sovereignty*, in full dominion, to the middle of the river, or the main channel thereof, from the time they became States, without any preference in either by possession, or by being first established on either bank. In this view of the case, the right to the Pea Patch depends on the facts as you shall find them. The law of nations assigns the right of property to the State nearest to whose shore it lies, or between whose shore and the main channel the island is situated.

[8.]

If you believe the witnesses, the plaintiff has made out his case in this view of it. But the nature of the case and the course of the argument, makes it necessary to examine the title in other respects, in order to ascertain whether it must be decided on rules different from those prescribed by the law of nations for ascertaining the boundaries of States. This leads us to an inquiry concerning the original grants by the Crown of Great Britain of New Jersey to the Duke of York, and of those counties on the Delaware by the latter to William Penn. By the charter to the Duke of York, in 1664, the King granted him all the lands from the west side of the Connecticut river to the east side of the Delaware bay. In the same year, the Duke of York, to Lords Berkeley and Carteret, the land to the west of Long island and Massachusetts island, and "bounded on the east, part by the main sea and part by Hudson's river, and lieth upon the west Delaware bay or river, and extendeth southward to the main ocean, as far as Cape May, at the mouth of Delaware bay, and to the north as far as the northernmost branch of the said bay or river of Delaware," &c. (Patt. L. App. 1, iv.)

In construing these grants, it must be remembered, that before that from the King, he was the acknowledged sovereign of the whole territory on both sides of the Delaware; and though he granted soil and jurisdiction in full and absolute propriety, and established a proprietary government, yet it was with a defined boundary. So was the grant from the Duke to Berkeley and Carteret. The proprietaries of New Jersey claiming by grant, therefore, were not on a footing with a State or nation claiming or settling a country on the bank of a river, who might extend their jurisdiction over its whole bed, unless they interfered with the rights of another State. This grant of the King severed from the royal dominion a described portion of territory, beyond the bounds of which neither the Duke, or his grantees could make any claim of rights, in opposition to the

acknowledged sovereignty of the King, over what was ungranted. Any claims which the proprietaries of New Jersey could make, or any possession which they might take beyond their assigned boundary, could in itself, give them no title. Hence it has been decided by this court, in Corfield *vs.* Coryell, (4 Wash., 371, &c., and in Bennett *vs.* Boggs, 1 Bald., 60,) that the west boundary of New Jersey, according to the terms and construction of the grant, was the low water mark in the Delaware. In so doing, our predecessors, as well as we, have followed the rule established by the Supreme Court, in Handlys Lee *vs.* Anthony. That case arose under the cession from the State of Virginia to the United States, of "all her right to the territory situate, lying, and being to the northwest of the river Ohio," which, by express stipulation, was to be laid off into independent States. Virginia had previously owned both sides of the Ohio, from Pennsylvania to its mouth; and it was held, that the cession commenced at low water mark, on the northwest side; that the river was the boundary between the States, not as in the case of two nations, each holding to the middle of the stream. "But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created State extends to the river only; the river, however, is the boundary." (5 Wh., 379.)

If any other ground were necessary to justify this construction of the grant of the Crown, it will be found on its face to contain an express grant "of Hudson's river." Had it been intended to grant the Delaware, it would not have been limited to the eastern side of it.

So far, then, as depended on the grant or charter of New Jersey, it extended only to the low water mark on the Delaware, which limited the right of soil and jurisdiction under the proprietary government, during its continuance, from 1664, till the surrender of the powers of government to the Crown, in 1702.

[10]

We now come to the title of Delaware by grant.

No patent or grant from the Crown, for the three counties, has ever appeared; and, from the opinion of the Crown lawyers, to whom the matter was referred, it would seem that none ever issued, at least not so far as to bind the King. (Chalmers, 40, 1.) This territory then remained as part of the royal domain, not having been severed by actual grant. As it was not in the original patent to the Duke of York, he could have no claim, by grant, beyond the east side of the Delaware.

But the Duke made his deeds of feoffment on the 24th August, 1682, to William Penn, comprehending the three counties.

By the first, he conveyed the "town of New Castle, and all that tract of land lying within the circle of compass of twelve miles about the same," situate, &c., on the Delaware, "and all islands in the said river Delaware, and the said river and soil thereof lying north of the southernmost part of the said circle of twelve miles about the said town." "To have and to hold the said town and circle of twelve miles of land about the same islands," and all other the premises, and with covenant for further assurance thereof, &c. Appointing also attorneys to take possession and seizin of the premises, and deliver them to William Penn, &c.

By the second deed, the Duke, in like manner, conveyed to William Penn all that tract of land on the Delaware, beginning twelve miles south of New Castle, extending to Cape Henlopen, with the free use and passage into and out of all bays, rivers, isles, and inlets, together with the soil, &c., isles, rivers, &c., situate in, or belonging unto, the limits and bounds aforesaid. (1 Laws of Delaware, App., 1, 4.) This deed contained also a covenant of further assurance, and a power of attorney to certain persons therein named, to take and deliver possession and seizin. Neither deed contains any recital of a patent or grant from

the King to the Duke, though in the grant from the Duke of New Jersey to Lord Carteret and Berkeley, the patent to the Duke is recited. Both deeds contain a grant of seignories and royalties, the effect of which was to grant not only the soil, but the rights of a proprietary as to jurisdiction and government, yet no authority for such a grant is referred to. We find, however, by an authentic document, the act of union between the people of the three counties and William Penn, annexing them to the province of Pennsylvania, dated 7th December, 1682, the nature of the title which the Duke claimed and conveyed, set forth in the preamble and recitals.

The country was in possession of the Dutch, who purchased it from the natives. The Dutch surrendered it, upon articles of peace, to the King's Lieutenant Governor, Colonel Nicolls, and afterwards to Sir Samuel Andross, Lieutenant Governor to the Duke, and "hath by him been quietly possessed and enjoyed." (1 Laws of Delaware, App. 8.)

It thus appears that the Duke claimed this territory in right of conquest, and held it as an appendage to the government of New York, which was then in him. He had also claimed part of Pennsylvania by the same right, but had released it to William Penn before the act of union, as therein recited. (Vide 1, Proud. Hist. Pa., 122, 124, 135, 200, 206.)

Two questions arise on these deeds, 1st. Whether they passed any tile. 2d. Their construction as to boundaries.

It is a settled principle of the British Government, that a subject cannot acquire territory to himself by the right of conquest. All acquisitions so made accrue to the Crown. (Chalmers, 69.)

No subject can create or erect a seigniory or proprietary government unless he held them by a grant of these franchises from the King. A royalty a seigniory, or propriety, can be held only by act of Parliament, letters

patent, or prescription. (4 Com. Dig., 454, D. 1; Dar. Rep., 165, &c.)

These would be fatal objections to the operation of the deeds of the Duke of York, to pass either the right of soil or jurisdiction to William Penn, if the title to either depended alone on those deeds; but as there are other considerations which bear on them, and will be stated hereafter, we will proceed to the construction of these deeds, assuming their validity. The same rules of construction apply to treaties of cession, grants by governments by letters patent, as to deeds of individuals, (6 Pet., 638;) and these deeds must not be so construed as not to come in conflict with a prior grant of New Jersey to the Duke, or by him to Berkeley and Carteret, for a government is never presumed to grant the same thing twice.

The deeds must be taken according to the right and claim in which they were made, so as not to embrace territory which was not acquired from the Dutch, nor to authorize the exercise of any power in the Governor of New York, over any part of New Jersey, which had been denied by the solemn declaration of the Duke of York, in 1672, (Leam and Sp. 31, 2, 6,) and by the King in the same year, recognising and confirming the absolute rights of Berkeley and Carteret as proprietors of New Jersey, (Leam. and Sp. 39, 49.)

No part of the province was therefore embraced, nor could it pass by those deeds to William Penn, as it had been before granted by the former grantor, and as they contained no recital of a grant by the King to the Duke, they shall not be taken by implication to embrace any part of what the King had granted. As both deeds were executed at the same time, and for contiguous territory, they ought to be construed alike if the words will permit; they must also be taken in relation to the parties to the grant, its object and the subject of the grant. The Duke

was the grantor of two proprietary territories on the opposite banks of the Delaware; after the division of New Jersey between Lords Berkeley and Carteret, the latter, to whom the west part was allotted, conveyed it to William Penn and others in trust (Leam. and Sp. 65, 7, 70.)

In 1682, William Penn was proprietary of the three counties in his own right, and joint proprietor of West New Jersey in trust. He could, therefore, acquire no right in New Jersey in relation to his trust, or to the injury of his *cestui que* trust. To construe the deeds so as to do this, would be contrary to all rules of laws; as derogatory to the honor and integrity of the Duke in granting what he had before confirmed, and Penn in accepting for his own use a grant of any part of what he held in trust for another. Besides, the main consideration of the deeds of feoffment was to reward William Penn for the services of his father, which could not be done by granting him that which belonged to the proprietors of New Jersey. From these considerations, an obvious rule of construction arises: the deeds to Penn must be construed strictly against the Duke, favorably to the elder grantee, under him, and strictly against the younger grantee; so that they shall not be held to grant the same thing twice. (Vide 6. Pet. 638, &c., for the rules of construing public grants.)

We will now consider the two deeds thus construed.

There are three points in the first deed: one in New Castle, (vide. 1, Vez. sec. 450;) one on the Delaware, twelve miles north; the other on the Delaware, twelve miles south; but it does not purport to extend across the river, or to embrace any part of New Jersey, within the circle, or, if it did, the grant would be so far void, for the reasons before given. It is of a "tract of land" lying on the Delaware, the bounds of which must be on the bank, and not in the river, following the process of the circle. That this is the meaning of this deed, is evident from the boundaries of the second deed, granting "that

tract of land upon Delaware river and bay, beginning twelve miles south from the town of New Castle." We have, then, no difficulty in ascertaining the *land* that was granted to be that which lay on the river between the two points, each twelve miles distant from a common circle in New Castle: and from such centre twelve miles back from the river towards Pennsylvania and Maryland, and no other, nor beyond the low water mark on the river. Then follows the grant of "all islands in the said river Delaware and the said river and soil thereof, lying north of the southermost part of the said circle of twelve miles, about the said town. The habendum is of the said town and circle of twelve miles of land about the same, islands and all other the premises granted or intended to be, &c.;" and the same clause is in the covenant for further assurance, omitting the grant of the river, otherwise than as it may be included as part of the premises granted or intended to be granted. A reference to the second deed will tend to ascertain the meaning of the first: there is no grant of any part of the river, or any island below the beginning point of the second tract; a grant of the use of the harbors, waters, &c., belonging to the river and bay, precludes any construction which would make the deed pass the river, bay, or its waters, beyond the low water line. No word or expression is in it, which could be made to include anything else; the grant is of the free "use and passage into and out of all harbors, bays, waters, rivers, isles, and inlets, belonging to, or leading to, the same," (Delaware river and bay.) Now it would be a singular construction of the two deeds, to hold them to make the east boundary of the entire grant, the radius of a circle extending from the north and south points of the first grant, across the Delaware in the water to the Jersey shore, and south to Cape Henly, only to the low water line. We think the deeds are not to be so taken, and that the utmost

latitude which can be given to the first, is, to include only such islands and such parts of the river, as lie between a direct line drawn from the north and south points where the circle strikes the Delaware, and on its western bank. Taking the granting part of the deed, with the habendum and the covenant for further assurance, it would admit of a still narrower construction. By omitting the river in the two latter clauses which specially mentioned the main land and the islands, it might be fairly inferred that the grant was intended to cover no more, so as to make it conform to the second grant, below the twelve mile point, the grant of New Jersey to Berkeley and Carteret, and of Pennsylvania to William Penn, all of which were limited by the Delaware as the boundary. Or, if that construction would be too strict, we would be clearly of opinion that the grant of "the river and the soil thereof," would not extend beyond its main channel, according to the course of the river opposite its western bank, between the two twelve mile points, north and south of New Castle, upon the shore of the river. On this or any other view of the deeds of 1682, we think that they did not embrace that part of the river in which the island in question is situated. From the traditionary evidence in the cause, you will probably concur with us in opinion, that there was no island there at that time, or for a long time thereafter; of this fact you will judge. If the island has arisen since 1682, it did not pass by the [grant] of islands in the Delaware; if the site of it was then connected with the Jersey shore, by a bar or sand bank, as has been contended for the plaintiffs' council, then if it was bare at low water, it belongs to Jersey. (Vide 5, Wh.: 75.) From the evidence as to the encroachment on the Jersey shore, opposite to where the island now is, you will decide on this fact. If, on the other hand, the site of the island has been always covered with water, we think it did not pass by the deed, unless you find

it to have been, in 1682, west of the main channel of the river; but that the right to that part of the river remained in the King, as an ungranted part of his domain. You will then consider, that if the place where this island now is, was, in 1664, bare at low water, it passed to Berkeley and Carteret by the grant to them of New Jersey by the Duke of York; if it remained always under water, it belonged neither to the Duke, Berkeley and Carteret, or William Penn, in virtue of any tile derived by the King's patent to the Duke, or his deeds to Penn, but that the right remained in the Crown.

We have stated to you that, in strictness, no title passed by the deeds of the Duke, because being a subject of the King, any territory acquired by conquest by the Governors of New York, became the domain of the Crown, which the Duke could not grant, nor could he create a proprietary government by his own authority. But though originally the title was not valid, it became so by the subsequent acquiescence of the Crown in the long possession of the territory by William Penn, and the exercise of the powers of government, from 1682 till the revolution, as well as by various acts of the Crown, recognizing the existence of a proprietary government, under the deeds of the Duke of York. It was held, so long ago as 1750, by Lord Hardwick, in the great case of Penn *vs.* Baltimore, that the title of W. Penn to the three lower counties was good, by the possession of the Penns, and by their being permitted to appoint Governors over them, which have been appointed by the Crown. Long possession and enjoyment, peopling and settling counties, is one of the best evidence of title to lands, or districts of lands, in America, that can be. Those persons, therefore, who make these settlements, ought to be protected in their possession, as far as law and equity can. (1 C., s. 455,

454.) This protection is afforded by the presumption of law, that a long quiet possession either of land or a franchise began with a grant. This is what we call, in law, a title by prescription, not because it is believed that a grant ever in fact existed, but because the law will presume it, and not require any proof of the fact, or suffer it to be questioned. A direct grant of lands in a royal haven, may be presumed to have been made by the King, after sixty years uninterrupted possession, and whatever may be held by grant, may be held by prescription, even against the Crown. As to the three lower counties, there is every evidence short of the sign-manual of the King to letters patent, that the title was lawfully in William Penn and his heirs. You will, therefore, take it as proved, that the King had approved and confirmed the deeds of 1682, after a possession of ninety-four years, to the time of the revolution. The title became as good as the King could make it. (9 Pet. 760.) But there is a difference between a title by prescription, or a grant presumed from long possession, and one derived by a grant produced in evidence before you; in the latter case the extent of the grant and its boundaries are defined, whereas, in the former, they depend on the claim and possession. Prescription can only apply so far as a possession has been had under claim and color of title, or acts of ownership, or jurisdiction has been exercised. The presumed grant will cover all that has been quietly enjoyed, for such time as suffices to raise the presumption, but the notice of a title by prescription necessarily limits it to what has been possessed, or claimed by right or color of title.

In reviewing the evidence in the case, we do not find any possession or claim of right, by the Penns or the State of Delaware, to this island, nor is there to be found in the legislation of Pennsylvania during the union of the province with the three counties, or by the State

of Delaware since the separation, any right asserted, or any jurisdiction assumed or exercised over it, until 1813, when she made the cession to the United States. It is, therefore, not a case where her title can be held good by prescription, or presumed grant against the King; it must rest on the acts of approbation and confirmation by the Crown, which give the same effect to the deeds of the Duke of York as if they had been made under letters patent to him by the same boundaries. Assuming the title to be perfect, assuming, also, that it extended to that part of the river in which the island is situated, which is the strongest case which Delaware can make, we proceed to the third view of the case, which is this:

Taking the long enjoyment of the rights of soil and government in the three lower counties as conclusive evidence of a grant or confirmation by letters patent from the Crown, then the proprietaries of New Jersey and William Penn, by their respective deeds from the Duke of York, stood on an equal footing before the revolution. Each is deemed to be in the actual legal possession, and to have the legal seizin of the subject matter of the grant, according to their respective boundaries, unless so far as the other may have taken and continued an adverse possession. (6 Pet. 743.)

By an adverse possession is to be understood the exercise of acts of ownership in the soil, or the propriety right of jurisdiction and government, by one proprietary within the boundaries of the other, under the assertion of a right or color of title in himself to the place in controversy, as a part of his own territory or property. When there arises such a case, the actual possession of land, or the undisputed exercise of the right of property by granting it, or of jurisdiction by acts of legislation, affecting it for a great length of time, the principle of prescription applies between two proprietaries, by which it will be presumed that an uninterrupted enjoyment of

a right of property or government was founded on an original grant or a confirmation. It is on this principle alone that the title of the Duke of York, and of W. Penn, to the lower counties can vest, in opposition to the original right of the Crown. The same principle must also apply to the proprietaries of New Jersey, if they can show a similar foundation for the prescription of a grant from the Crown, or a confirmation to the extent of their possession, or exercise of jurisdiction over the Delaware or the islands in it. It is also a settled principle of the law of nations, that prescription applies between State and State, nation and nation, when the possession of territory, or the enjoyment of rights of sovereignty, has been long quiet and unquestioned, (Vattell 121, Grot. 174, 180, Puff. 449.) When a question of this kind arises between nations, the presumption is, that ancient possession has been according to the original boundaries between them, or by some convention mutually made; not the presumption of a grant from one to the other, as that would imply on original exclusive right which must be held derivatively.

As to two proprietary governments separated by a large river, prescription applies in favor of each against the Crown, the common grantor under whom they both hold; and between each other it applies as between two nations, for either proprietary claims from the other, or acknowledges any original right to what the one claims, to have ever been in the other, so as to make it a subject of grant or confirmation, in any way, but by a grant to himself from the Crown.

We now come to the application of these principles, to the claims of the proprietaries of New Jersey to islands in the Delaware, and the exercise of the powers of government on that river.

It appears that, from 1739 at least, islands in the Delaware have been surveyed under West Jersey proprietary

warrants, and held by that title to the present day; so that there has been an uninterrupted exercise and enjoyment of a right of property by the proprietaries for 97 years. The government of the province had been in the Crown from 1702, so that these surveys and possession taken under them, were acts of notoriety presumed to be within the knowledge of the local Governors, who were the immediate representatives of the Crown; and as the right was not contested, it would have been good by prescription, if the royal Government had continued for sixty years from the time of the survey; but, as the State of New Jersey succeeded to the rights of the Crown, without ever questioning the right of the proprietaries to grant islands, every presumption which could be made in their favor against the Crown, applies to the State as its successor, by the declaration of independence, or in virtue of the treaty of peace, by the relinquishment of the King. It is also a matter of judicial history and knowledge, that the riparian owners of lands on the Delaware have, from time immemorial, enjoyed the rights of fishery opposite their shores, which has been transmitted and conveyed as property, and is so recognized by the compact between Pennsylvania and New Jersey in 1783.

Various laws have also been referred to, regulating the right of fishing in the Delaware, which are direct and unequivocal claims and assertions of right; and what gives them greater weight is, that they are the acts of a royal Government over the province, whose boundaries must be presumed to be co-extensive with the exercise of legislative power. The King is, of course, presumed to have ratified and confirmed the acts of his Governor.

The Penns also granted islands in the Delaware, opposite and near the Pennsylvania shore; always exercised jurisdiction on the river; and claimed those islands to the middle of the river, which rights were asserted before the King in council, with success. (12 S. & R. 209-10.)

So far, then, as respects the rights of the crown to any islands in the Delaware before the revolution, or of the State of New Jersey since, they must be taken to be in the proprietaries by prescription, and the right of jurisdiction under the royal and State Government, to have been exercised by claim and color of right to the middle of the river, and, therefore, as valid as if the King had granted, by letters patent, both soil and sovereignty.

By the same principles, the rights of the proprietaries in and over the three lower counties are perfect to the extent of any possession or exercise of jurisdiction or acts of legislation, which are the foundation for the presumption from prescription against the crown. But as there is no evidence that William Penn or his successors ever made any claim to the island in question, or exercised any jurisdiction in or over the Delaware, beyond the middle thereof, or the main channel, they can have had no rights by prescription. And admitting that, by the first deed from the Duke of York, this island would be within the twelve mile circle; the adverse claim of the proprietaries of New Jersey, and the exercise of jurisdiction to the middle of the river, would bar the right of the Penns by prescription, whether they are considered as private persons, or as a proprietary government. As individuals, the Penns could claim no exemption from the effects of time, running on a long and uninterrupted possession without an adverse possession or claim, by themselves; as a government, they must submit to the rule which prevails among States, that peaceable possession is evidence of original or agreed boundary. Thus the matter stood between the two proprietaries, till New Jersey and the three lower counties assumed the position and rights of independent States; the one abolished the royal, the other the proprietary government; yet neither interfered with the proprietary right of soil within their limits, so that the only change effected was of government. This left the jurisdiction over the Delaware and its islands a matter between the two States.

[22]

The right of property in the island still remained [illegible] question, if at all, only one between the two proprietaries until one of the States would assume the right to [illegible] proprietary in their sovereign capacity.

From the 4th of July, 1776, the rights of soil and jurisdiction became separated, so that from that [illegible] the proprietaries were private owners of the land, against whom time would run in favor of adverse possession [illegible] an individual; it was no longer a question as between proprietary and the King, or proprietary against [illegible] prietary, each being a Government. There was no longer a propriety; that could not exist in a State. The name of proprietary might be retained, but he could be viewed in no other light than any other great owner of land, who has the legal seizin and possession to the extent of his title, till he is desseised by an adverse possession, from which time a limitation begins to run against his right.

In the year 1784, this island was surveyed for Edward and Clement Hall on a West Jersey proprietary warrant under which it was held until their title became vested in the plaintiff; from this time, he stood in place of the West Jersey proprietors, entitled to all their rights by prescription against the Crown, against the Penns and the State of New Jersey, and, in his own right, by his possession, such as it was, entitled to the benefit of any limitation which had begun or commenced running from the date of the survey. As there was no adverse possession or claim, his legal seizin or possession continued till his dispossession by the United States in 1813, a period of 31 years, which would bar the right of entry of any adverse claimant; and, connected with the general claim of the proprietaries of New Jersey to the islands in the Delaware from 1739, would make the title good by a prescription of 74 years quiet enjoyment, adverse to any right under the deeds of the Duke of York to William Penn.

[23]

On her becoming a State, Delaware had an election to consider herself as succeeding to the rights of the proprietaries of the three counties; and standing in their place, as to all their former rights of soil, in virtue of the deeds of the Duke of York, in which case she would have been entitled to all presumptions founded on prescription against the Crown, to the same extent that the Penns were, or Delaware might claim, as succeeding to all the rights of the Crown, as devolved on her by the revolution; and, repudiating the deeds of the Duke as usurpation on the acknowledged prerogative of the King, elect to hold the lands of the proprietaries in the original right of the Crown. Such election, however, was not made till 18 years after the declaration of independence, when, by a law of Delaware, passed in 1794, it was declared "that the soil and lands, within the limits of the State, became the right and property of the citizens thereof," by the treaty of peace, by which the King relinquished all proprietary and territorial rights for the sole use and benefit of the citizens;" and "that the claims of the late and former pretended proprietaries of this State to the soil and lands contained within the same, are not founded either in law or equity." (2 Laws Del., 1174-5.) This solemn repudiation of any claim under the deeds to Penn, and the express claim asserted by the relinquishment of the Crown as the source of the title of the State to the unappropriated lands within their boundaries, precludes the State from claiming any benefit, by prescription, from the long possession of soil and government by the Penns from 1682 to 1776, or by the deeds of the Duke of York; and, as the State asserts title by the treaty of peace, as a cession by the King, she can have no better right than the King had at the time of the treaty or before; if time had so run on his right, that he would have been presumed to have given a patent of grant or confirmation for any lands, or of any proprietary or territorial rights, the bar would

operate as well against the State as the King under whom the State held. Had Delaware claimed to hold by the right of Penn, there is sufficient evidence in the cause to presume a right in the New Jersey proprietaries, by prescription, to the island in question as against them. In such case, Delaware must have claimed subject to such right, had she claimed the lands in the State as her own; without declaring by what title she could have rested on any which could be produced.

Having, however, abjured any other than the title of the Crown, she must rest upon that in support of the right which she ceded to the United States by the act of 1813; that title is not valid, because the principle of prescription had previously made good the title of the New Jersey proprietaries under the patent to the Duke of York, according to their possession or claim under or by color thereof.

Another principle is also decisive against the right of Delaware:

Assuming that no right existed in the Jersey proprietaries beyond the low water mark in the Delaware, and that the survey of this island in 1784 was void, then, Delaware having renounced any title under the deeds to Penn, the two States, by their declaration of independence, stood on an equal footing as each invested with the rights of the King to all that part of the Delaware and its islands which he had not granted. Their respective rights would extend to the middle of the river, or its main channel; the consequence is, that, if this island was nearest the Jersey shore, or east of the main channel, it belonged to New Jersey as a State; her title passed to the plaintiff by the act of 1831, ceding the right of the State to him. Unless, therefore, you have a difficulty in ascertaining where the main channel of the Delaware is, or nearest which shore the island lies, your verdict ought to be for the plaintiff.

[1]

APPENDIX "E."

Defendant's Exhibit No. 676.

Opinion of Hon. John Sergeant in the case of Pea Patch Island.

Decision of the Hon. John Sergeant, arbitrator.
(Jan. 15, 1849)

The question submitted by the United States on the one side, and James Humphrey on the other, is thus stated in the submission: "to decide the question of the title to the Pea Patch Island, as derived by the United States from the State of Delaware, and by the said James Humphrey, claiming through the said Henry Gale, deceased, from the State of New Jersey."

The importance of the case consists chiefly in this; that it involves the question of the boundary for nearly twenty-five miles, between the two States just named. It is true that the settlement of that boundary is not submitted, nor to be decided in the arbitration, New Jersey and Delaware not being parties to the submission, nor having agreed so to submit their rights. But it is also true that, in conveying the one to the United States, and the other to an individual, the island in controversy, they have necessarily communicated to the grantees the right to assert the title respectively conveyed to them, and to dispute the adverse title; and it is very manifest that this controversy turns mainly, if not entirely, upon the question of the limits and jurisdiction of the respective States. If the Pea Patch island is within the State of New Jersey, the title is in Mr. Humphrey. If within the State of Delaware, the title is in the United States.

The consideration and respect due to these States, as members of the Union, in whatever may

[2]

touch their rights and interests, seemed to require that as much publicity as possible should be given to the proceedings; and an intimation to that effect was promptly acceded to by the city and county of Philadelphia, in liberally granting to the arbitrator the use, first, of the supreme Court chamber, and afterwards, of the venerable hall of independence. The arbitrator was attended by the counsel of the parties, who had laboriously searched out the evidence, wherever it could be found, and followed its production with an able and learned, as well as interesting, discussion on both sides. It is believed that nothing has been omitted in either respect; and that there is no reason to suppose that anything in the shape of evidence or argument remains unexplored, which could throw additional light upon the subject. It remains for the arbitrator, after careful deliberation, and with the aids just mentioned, having come to a conclusion satisfactory to himself to make his award. In ordinary cases his duty would be performed by simply executing the needful paper, and giving it the direction which is required, in order to render it, as demanded by the submission, "final and conclusive between the United States and the said James Humphrey, claiming under the said Henry Gale, deceased."

But the same motives of consideration and respect, already stated, for giving the utmost publicity to the proceedings; the nature of the controversy; the length of time it has been pending; the names that have been connected with it, from whom he will feel himself bound to differ in his views, or at least to appear to differ; and, he must add, the great confidence reposed in him by the parties in leaving the matter so long litigated to his sole determination—a confidence which forbids him to doubt his ability to

decide it, but by no means relieves him from an anxious sense of the responsibility of the task he has, by their invitation, undertaken—all these things concur to impose upon him the duty, as it is also his desire, to present, in an intelligible and somewhat permanent form, the grounds of his decision, for the satisfaction of the parties, and the examination of those who may feel any curiosity about the case or any interest in it. He is fully aware that his opinion is of no authority whatever, except for the single purpose as to which the agreement of the parties has made it conclusive; that is, the question of title between them. He will, therefore, proceed to state these grounds as briefly as may be consistent with perspicuity.

The island in controversy, called the Pea Patch, lies in the river Delaware, rather less than five miles from Newcastle, in a southeastwardly direction. The most satisfactory evidence respecting it was given by Wilson M. C. Fairfax, esq., of the United States coast survey, being from actual and careful survey and measurement. It was in writing, and not under oath, but was received by consent of both parties; and there is no reason to doubt its accuracy. According to this witness, the length of the island is 1,083 yards, its average breadth 461 yards, and its area 87.60 acres. The mid-line of the island, at its north extremity, is 2,090 yards from the Delaware shore, and 2,130 from the Jersey shore—the mid-line of the southern extremity is 2,130 yards from the Delaware shore, and 1,875 yards from the Jersey shore. The middle line of the river Delaware, he says, run through the island would throw 21.9 acres on the Delaware side, and 65.7 acres to the New Jersey side. Such a line, he states, would pass through the

island 46 yards northeast of the southwest extremity of the wharf at the lower end of the island which projects towards the Delaware shore, and 20 yards eastward of the middle point of the upper end of the island. With respect to the water, the witness says, the main and deepest channel of the Delaware river opposite the Pea Patch is on the Jersey side. The greatest depth of water in the channel on the Jersey side is 40 feet, and on the Delaware side 25 feet. The average depth of water in the channel of the Jersey side is 32 feet, and on the Delaware side 23 feet. But to take the entire channel on either side of the island, no vessel drawing more than nineteen feet water, at low water of spring tide, can pass through. The Jersey channel is the shortest and widest, and both about equally curved.

Witnesses have been produced to show which is the main channel of the river, as to which they have differed in opinion. The greater part, probably, have thought the western or Delaware channel to be the main channel. They have stated that the bottom on that side is softer and safer, as well as better holding ground, than on the east, though they state, also, that the eastern channel has undergone changes at different periods. Some of them have stated, too, and no doubt truly, that the shore on the Jersey side, opposite the Pea Patch, has been wearing away considerably for some years past. And, finally, some of them, judging only from sight, have asserted the island to be nearer to New Jersey than to Delaware. As to this, however, the evidence from survey and measurement already referred to, is much more to be relied upon than opinions like these.

In the view to be taken of the case, and with reference to the grounds upon which it will be de-

cided, it is not necessary to go into the particulars of the testimony just adverted to. The material facts, about which there can be no dispute, are these: The island is on the river Delaware, with a deep channel on each side; is far below the low-water mark on both sides; is not connected with the land either of New Jersey or Delaware; and is at all times of tide surrounded by water. There is a shoal, called the Bulkhead shoal, from the northern end, towards the northward and eastward, but it is never bare; and is, besides, pierced by a channel of such width and depth, that vessels of heavy draught of water can pass through it. The only question raised about it, and that not at all material, is, whether large-sized vessels can beat through it from the western channel to the eastern, or in the opposite direction, against a head wind. The fact is, that vessels can pass entirely round the island, upon the waters of the river, at all times of the tide. The island is in the waters of the Delaware.

It is proper further to state, that this island is of comparatively recent formation. Maps and charts, as late as the middle of the eighteenth century, do not mention it. Kensey Johns, esq, who was eighty-eight years and four months old at the time of his examination, (November 2, 1847,) a witness not more venerable for his years than for the high stations he had held, and the uniform excellence of his character and conduct through his long life, states that he had resided in Newcastle from the year 1780 till that day. He then says, "I do know it (the Pea Patch) and have known it since the year 1780. At first it appeared about the size of a man's hat. In 1813, when the United States took possession of it, it had grown to be a large island. It was not worth a cent to a private

citizen; the expense of banking would have been more than it was worth." The general conclusion seemed to be on both sides that it had not made its appearance earlier than 1770, which, in the argument, seemed to be an agreed time of its beginning to be visible, and was probably nearly correct. It would seem, with some allowance for what must be measureably hypothetical, to have sprung up from the bottom, in the deep channel of the river, dividing that channel into the two channels, whose respective titles to the dignity of the "main channel," have been so much controverted in the evidence and the argument. From other evidence, it appears that, until the United States made some embankment, the island was nearly, if not entirely covered with water at every tide.

The main point, however, is that before mentioned, which will not be affected by any error in the conjecture just stated. From its first appearance, the island has always been where it now is, that is to say, in the deep river, below the low water mark, surrounded by navigable water, and separated at all times from the land on both sides.

The description and accounnt thus given of the subject of controversy, are deemed to be sufficient for the present, to introduce and render intelligible the several questions to be considered and decided. They are indisputable, it is believed, and stand as facts beyond the reach of the conflicts in the evidence as to other matters, not deemed to be important, and therefore laid aside.

We are thus brought, after stating what the thing in controversy is, enabling us to judge by what kind of title such a thing can be claimed and held, to

the examination of the case made out by the respective parties. And it is proposed to begin with the case of Mr. Humphrey, as most conducive to the right understanding of the questions to be considered.

Has Mr. Humphrey made out a title?

He begins taking the evidence in chronological order, and not in the order in which it was introduced, with the copy of the record of two warrants from the proprietaries of west New Jersey, one dated November 4, 1743, for 600 acres of unappropriated land in west New Jersey, the other dated August 7, 1782, for 5,000 acres, a return of a survey under them for Edward and Clement Hall, October 8, 1784, "of an island in the river Delaware, called the Pea Patch, situate in the county of Salem, about one mile west from Finn's point, in Penn's neck, and is about west of the mouth of Salem creek, &c., containing 178 acres of marsh, sand bank, and mud flats. Newcastle distant about 4½ miles." The record adds: "November 3, 1784, inspected and approved by the council of proprietors and ordered to be recorded."

This record, authenticated as it was, was good evidence by the laws of New Jersey, and therefore was good evidence in this arbitration. It was accordingly admitted.

Many objections were made to the warrants, and especially to the survey, which need not be stated. The answer to them all was this, that if the proprietaries of west New Jersey were the owners of the island, and had power to grant it, it was for them, and for them only, where there was no interfering right, to object to irregularities in the warrants or in the surveys under them. By accepting and approving the return of survey, and ordering it to be recorded,

they waived all such objections, and no one else could make them, unless he had a right which was interfered with. The survey must, therefore, be taken to be good, and to have vested the title in the Messrs. Hall, if the proprietaries had a right to grant. From Messrs. Hall, the title, by mesne conveyances, was regularly derived to Mr. Humphrey, so as to vest in him all the right they had, which, as we have seen, was all the proprietaries could give, neither more nor less.

The question then is, what right had the proprietaries? When Judge Baldwin gave his charge to the jury in the case of Gale's lessee *vs.* Beling, in the circuit court of the United States for the district of New Jersey, (which will be more particularly noticed hereafter,) the case of Martin *vs.* Waddell (16 Pet. 367) had not been decided by the Supreme Court of the United States, where it was brought by writ of error to the circuit court just mentioned, upon a judgment there rendered, Judge Baldwin presiding. The decision of the Supreme Court was in 1842. Being upon a question within the jurisdiction of that high court, it is deemed to be of the highest authority in all inferior tribunals, and, of course, in this, in point of authority, the most humble of all. The point there decided, to say nothing of the learned and satisfactory reasoning of the chief justice (Taney) in delivering the opinion of the majority of the court, the very point decided is, *that after the surrender to the crown in 1702,* by the proprietors of east New Jersey, of the powers of government, *they had no right in the navigable rivers within the charter limits of New Jersey, nor to the soil under them, and have had none since.* In this respect, the west New Jersey proprietaries stand upon the same ground precisely. Both sur-

rendered the powers of government at the same time, and, it is believed, in the same terms. The decision of the Supreme Court equally settles the law for both. It follows, that the west New Jersey proprietors, at the date of the warrants and survey, and acceptance of the survey, had no right in the river Delaware, even though it had been within the charter limits of New Jersey, (which will be hereafter examined,) and could give no right in the island to Messrs. Hall. For, upon the survey itself, it appeared that the island was "in the river Delaware," and that it was "about one mile" from Finn's point, the nearest land on the Jersey coast.

The same point was decided in the same way by the highest judicial tribunal of the State of New Jersey.—Munday *vs.* Arnold, 1 Halsted, 1.

Pennington, 391. The first of these cases is said to have been upon a location made to try the right. In the other it came up incidentally.

The concurring judgments of the Supreme Court of the United States, and of the judges of the highest court of New Jersey, in such a matter, certainly do amount to binding authority. In accepting them as such, however, it is not to be understood that any doubt is entertained of the solidity of the grounds upon which they were made. It may be deemed presumptuous, perhaps, even to suggest that they are approved, where approval is of so little consequence, indeed so entirely valueless, in comparison with the proper and intrinsic weight of the judgments of these high courts, and especially of the Supreme Court of the United States. It may be allowable, nevertheless, to add, in vindication only of the effort to fulfil the whole duty confided to the arbitrator, that if the

question were new, and to be examined without the aid of the great light thrown upon it by the opinion of the Supreme Court of the United States, having fully and deliberately examined the question, he should, upon original grounds, come to the same conclusion that he most willingy yields to the rightful authority of the judgment. It seems contrary to reason, and against the spirit of our institutions, that great public rights, in which all have an interest and concern in common, should be without a public guardianship, disinterested enough to regard all with impartiality, and powerful enough to protect them in the enjoyment of their privileges. Government is the proper trustee, everywhere existing with the consent or allowance of the people, and in our representative republics by free election, with the power of change. If, in the discharge of such trust, portions might be disposed of, so as to diminish the common fund, still there would be no contradiction, as is supposed of one or more of the grants by the State of New Jersey, for it must be presumed that such disposition is itself in some way for the common benefit, and on terms the least injurious to the public. A private proprietor, on the contrary, looks only, and rightfully looks only, to his own advantage.

The conclusion upon this point is, that the survey was merely void, that it gave no title, and that no title can be derived from it, the proprietors themselves having no right in a navigable river, nor any power to grant.

The next evidence of title exhibited and relied upon by Mr. Humphrey, is an act of the legislature of the State of New Jersey, dated the 24th November, 1831, granting to Henry Gale, his heirs and assigns,

"all the right and title of the said State of New Jersey to the said island called the Pea Patch, situate in the river Delaware, in the township of Lower Penn's Neck, in the county of Salem and State of New Jersey, as mentioned and described in the before mentioned survey," meaning the survey of 1784.

This act, it will be seen, was passed about seventeen years after the present controversy began, and during the time the United States were in actual possession of the island. The counsel of Mr. Humphrey, in the course of the argument, objected to the cession of the island to the United States by the State of Delaware, on the ground that the State was not in possession, but it was adversely held and possessed, and therefore could not be lawfully conveyed. The same objection applies to New Jersey. Whether such is the law of New Jersey or Delaware, is not known. It is believed not to be so. But it is not material to inquire into the matter, nor to examine particularly the evidence of possession, for a reason which seems to be a sufficient answer. Both acts of the respective legislatures, besides operating as grants, being passed with all the forms and sanctions of the constitution, were also acts of legislation, and, no third right intervening, could pro tanto repeal the general law, and give the required ability. Such would be their effect. If, then, the Pea Patch island was within the limits of New Jersey, and subject to her jurisdiction, there is no doubt of the sufficiency of the grant to pass the title of the State. The same may be said of the State of Delaware, whether they had champerty laws or not. It remains, too, to be shown that a sovereign State can be affected by adverse possession, unless so long continued as to found a presumption of grant.

[12]

It may be further remarked, that in this act the State of New Jersey does not assert a right or title. In the preamble the act recites the survey of 1784, the mesne conveyances to Henry Gale, and then proceeds as follows: "and whereas, it *hath been suggested* that the State of New Jersey hath some title thereto, and by reason thereof doubts have arisen concerning the title of the said Henry Gale," and then goes on to grant "all the right and title of the said State of New Jersey." This remark, it must be observed, does not affect the legal sufficiency of the grant to pass all the right of the State, and entitled Mr. Humphrey to claim under it. It is good between him and the State of New Jersey, and entitles him to vouch in his own behalf all the well founded claims of the State. But the grant is not in the ordinary form of a conveyance of land. It is only a quit-claim, which one may give to quiet doubts, whether he has a right or no right. The value of the fact is only as it shows, that as late as 1831, when the island, by great expenditures upon it by the United States government for works of public defence, had become an object of general attention and interest, the State of New Jersey made no assertion of right. The act, for a mere nominal consideration, simply relinquishes whatever right, if any, the State may have. And this remark may be further extended. It is believed that there has been no evidence to show that the State of New Jersey ever has claimed the title to be in her. It may be admitted that the proprietors of west New Jersey did assert a right by the acceptance and approval of the survey. But they did so, in their own behalf, adversely to the State, under a claim which is now settled to have been unfounded.

In the recital, however, there is a statement entitled to some attention, in connexion with a part of the charge of his honor, the late Judge Baldwin, in the ejectment tried in the circuit court for the district of New Jersey. The recital is, that, by virtue of the survey, "Edward Hall and Clement Hall became seized and possessed," and that, by divers mesne conveyances, Henry Gale "hath become seized and possessed." The natural and the legal import of this language is only this, that the constructive legal possession of vacant land follows the right, and it must be admitted that, if the survey had given the right, he would have been, in this sense, in possession. But the proprietors themselves having no right or possession, could give none to their warrantee.

Judge Baldwin, in the latter part of his charge, comes to the following conclusion: "In the year 1784, this island was surveyed for Edward and Clement Hall on a west Jersey proprietary warrant, under which it was held until their title became vested in the plaintiff. From this time, he stood in place of the west Jersey proprietors, entitled to all their rights by prescription against the crown, against the Penns and the State of New Jersey; and, in his own right, by his possession, such as it was, entitled to the benefit of any limitation which had commenced or begun running from the date of the survey. As there was no adverse possession or claim, his legal seizin or possession continued till his dispossession by the United States in 1815, a period of 31 years, which would bar the right of entry of any adverse claimant; and, connected with the general claim of the proprietaries of New Jersey to the islands in the Delaware from 1739, would make the title good by a prescription of 74 years of quiet enjoyment, adverse to any

right under the deeds of the duke of York to Wm. Penn." He then concludes that the title under Gale is derived from the proprietors and is good, and, as has been seen, adverse to the State of New Jersey.

Unnecessary criticism upon the charge of Judge Baldwin, is forbidden by the respect due to the memory of a learned and able man, who so long filled an eminent judicial station. The several legal principles contained in the paragraph just quoted are neither affirmed nor disaffirmed. Nor is it required to point out the one great error which vitiates the whole of the charge. It has already been done authoritatively. The case of Martin *vs.* Waddell had not then been decided. The decision since has established a different doctrine from that of Judge Baldwin, upon full discussion and deliberate consideration, and in concurrence with the judgments of the courts of New Jersey, that, from 1702, the proprietors never had any right in navigable rivers, and, as there will be occasion to consider more fully hereafter, the right of the State did not come into existence until the 4th of July, 1776. Its origin is thus distinctly marked, being connected with the great public event of that day, which will never be forgotten, as it was the birthday of a nation, and registered with an exactness of which there is probably no other example in the annals of the world.

This then leads directly to the inquiry, whether the Delaware river was ever within the charter limits of New Jersey, in that part of it where the Pea Patch island has since grown up. If it were, the right would have become vested in the crown by the surrender of 1702, would have so continued until the 4th of July, 1776, and then would have passed to the State of New

Jersey as a part of her sovereignty, acquired on that day by severing her connexion with Great Britain, and assuming to herself all the powers of government. The derivation would thus have been from the crown, thought not by grant. To maintain that the part of the river in controversy was within the charter limits of New Jersey, the counsel for Mr. Humphrey have produced the following deeds and papers: Patent, 12th, March 1603-4, from Charles the II. king of England, to his brother the duke of York, his heirs, and assigns, for a large tract of territory, including what is now the State of New Jersey, the last boundary of which (now the west boundary of New Jersey) is as follows: "and all the lands from the west side of the Connecticut, to the east side of Delaware bay."

Lease and release, 23d and 24th June, 1664, the duke of York to John, Lord Berkely and Sir George Carteret, reciting the grant from the king to the duke of York, grant and convey "all that tract of land adjacent to New England, and lying and being to the west of Long island, and Manhitas island, and bounded on the east part by the main sea, and part by Hudson's river, and hath upon the west Delaware bay or river."

Patent 29, June, 1674, Charles the II. to the duke of New York, for New Jersey by the same description as before. Between this patent and the former one, New York had surrendered to the Dutch, and it is stated that the people of New Jersey sent deputies to New York, and swore allegiance to the States General and the prince of Orange. In February, 1674, a treaty of peace was signed between England and the States General, by which New York and New Jersey were restored to the English. This

deed is supposed to have been made to remove all doubts which might arise from these occurrences.

There is no necessity for tracing the conveyances further. The title is regularly declared to the proprietors of East New Jersey and west New Jersey, between whom the province was held in the portions it had been divided into by a partition theretofore made, and by the lines and boundaries then fixed.

In 1702, the proprietors of New Jersey surrendered to the crown the powers of government, and thenceforth were only private proprietors.

Returning, then, to the question, whether the Delaware river at the part of it now in controversy was within the charter limits of New Jersey, there can at this time of day be no question. It was not within the grant, and as far as is known, there has never been a dissentient opinion.

In 1721, the question was submitted to the law officers of the crown by the commissioners of trade and plantations. The opinion of Robert Raymond, attorney general, and Philip Yorke, solicitor general, will be found in the first volume of Chalmers' opinions, p. 59. They say as follows: "We have perused the said clauses," (in the charters of New Jersey and Pennsylvania,) "and have been attended by the agents of the parties, who claim the province of Pennsylvania, and their counsel, who laid before us a copy of the letters patent granting the said province, and have heard what have been alleged on both sides; and, upon consideration of the whole matter, are of opinion that no part of Delaware river, or the islands lying therein, are comprised within the granting words of the said letters patent, or of the said annexed ex-

tract of the grant of New Jersey; but we conceive the right to the same still remains in the crown." The opinions seems to have been acquiesced in, for there appears to have been no further proceedings before the commissioners of trade and plantations, nor before the king in counsel, whom the commissioners were sometimes employed to aid in colonial investigations; and if it should be suggested, that there were no agents present on the part of New Jersey, the answer is, the question was one and the same as to both, for Pennsylvania was bounded by the Delaware on the east, just as New Jersey was on the west.

Some stress might, perhaps, be laid upon the nature of this opinion, partaking, as it does, of the character of a judicial proceeding, and some, too, upon the names of the eminent men by whom it was given, and the high stations they afterwards adorned. But this is needless. The law of nations furnishes the same rule of decision. Here was the crown owning a large territory on both sides of a navigable river, (for, at the time of the latest of the patents to the duke of York, neither the grant of the three lower counties, nor of Pennsylvania, had been issued,) and he makes a conveyance of territory on one side of the river, bounding on, or bounded by, the river. Is the river, or any part of it, included in the grant? This is the very question which came before the Supreme Court of the United States in Handly's lessee *vs.* Anthony, (5 Wheat.,) in the year 1820. The decision of the court was delivered by C. J. Marshall, that the grantor retains the river within his own domain, and the grantee extends to the river only, and the low water mark is his boundary. The same point was decided, in the same way, by the supreme court of New Jersey, in Arnold *vs.* Mundy, (1 Halstead, 1,) in

1821, with only this difference of expression, "the grant is to the edge of the river only," leaving a doubt whether it is a line shifting with the rise and fall of the tide. The same point, as the limits of New Jersey on the Delaware river and bay, namely, that it was bounded by the low water mark on the east side, was decided by Judge Washington, in Corfield *vs.* Coryell, (4 Wash. C. C. R., 371,) in 1823; by Judge Baldwin, in Bennett *vs.* Boggs, (1 Bald. 60,) in 1830; and it was approved by him in the lessee of Gale *vs.* Beling, in 1833-4. It must, therefore, be considered as settled that, by her charter limits, the territory of New Jersey extended only to the low water mark of the Delaware river on the east side, and included no part of the river. It is, accordingly, so considered.

The States of Pennsylvania and New Jersey, as has been seen, being both bounded by the low water mark on their respective sides, and the river itself belonging to the crown, upon the declaration of independence, a new state of things arose. The right of the crown was extinguished, and the river lay vacant, a boundary between them. "When," says Chief Justice Marshall, (Handly's lessee *vs.* Anthony,) "a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream." The States of Pennsylvania and New Jersey adopted this rule. In 1783, a compact was made by commissioners mutually chosen, which was ratified by acts of their respective legislatures, in 1785. By this compact, concurrent jurisdiction upon the water was given to both States, with some restrictions not necessary to be detailed; some islands were specifically alloted to each State, pro-

ably from motives of convenience; and it was agreed that the rest should belong to the State to which they lay nearest, and that all islands which should thereafter be formed in the river, should be governed by the same principle. This agreement was limited southerly to "where the circular boundary of the State of Delaware toucheth upon the same," (Delaware river.) As between Pennsylvania and New Jersey, this compact was formed upon great deliberation, and with a full knowledge of the subject, as must be believed from the high character of the commissioners on both sides, and is in conformity with the principles afterwards laid down by the Supreme Court of the United States in the case, before cited, of Handly's lessee *vs.* Anthony.

If, then, that part of the river Delaware lying between the States of New Jersey and Delaware, which includes the Pea Patch island, was in the crown on the 4th July, 1776, "the original property not being in either," it would, on that day, have become vested in the two States. In that case, New Jersey would be entitled to the eastern portion of the river, though not within her charter limits, succeeding to that extent to the rights of the crown, which had been divested by the declaration of independence. Delaware, in the same case, would be entitled to the western portion. Both would commence their right from that day. How the line would be drawn, or whether it would place the island on the side of the one State or of the other, it is not material to inquire; for the views to be taken renders it unnecessary.

The question, having already shown that the "original property" was not in New Jersey, is thus reduced to the single inquiry, whether, on the event-

[20]

ful day referred to, the right to that part of the river was in the crown of England, or whether the "original property" was not in the province or colony which then became the State of Delaware. The "original property" of Delaware, that is, her title previously acquired and continued up to that day, becomes, therefore, the subject of examination, and has been accordingly examined, carefully and deliberately. The evidence, as far as necessary, will now be stated.

The title begins with two deeds of the 24th August, 1682, commonly termed the deeds of feoffment, from James, duke of York, to William Penn. The first of these deeds grants and conveys to Mr. Penn, his heirs and assigns forever, as follows: "all that the town of Newcastle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate lying and being upon the river Delaware, and all islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about the same town." The deed then covenants for further assurance, and appoints John Moll, esquire, and Ephraim Herman, gentleman, his attornies, jointly and severally, to enter into and take possession and seizin of the premises, and to deliver possession and seizin to Mr. Penn, his heirs and assigns.

The second of these deeds conveys to Mr. Penn all the territory from the south line of the preceding deed, that is, from "twelve miles south of Newcastle, and extending south to Capin Lopin," meaning Cape Henlopen. In this deed, there is no grant of "islands in the said river Delaware, and the said river and soil thereof."

These two deeds, it will be perceived, embrace the whole of the territory of what were called the "three lower counties," now the State of Delaware.

On the 28th October, 1682, the attornies appointed in the deeds of the duke of York made livery of seizin to Mr. Penn of the first of the tracts, of which a record is made and is still preserved, and is, in all respects, exact and particular. On the 7th November, 1682, as also appears of record, livery was made of the tract in the second grant to Captain William Markham, Mr. Penn's attorney. The declaration is signed by twelve witnesses, "in the Delaware river," probably on their passage up from below the twelve miles. Of both a record was made, and still remains, in all respects, exact and particular.

There is this remarkable difference in respect to the two grants; that, in the first, the livery is stated, besides "twig and turf," to be of "water and fowl of the river Delaware;" in the other, it is of "the land, soil and premises" in the indenture mentioned.

They state, also, that Mr. Penn remained in quiet possession. John Moll, the attorney, appointed by the duke of York, to deliver seizin, in his certificate, also recorded, is still more precise. Of the livery, under the first deed, he says they "did give and surrender to the said W. Penn, esq., actual and peaceable possession of the fort at Newcastle, by giving him the key thereof, to lock upon himself the door; which being opened by himself again, we did deliver also unto him one turf, with a twig upon it, *a porringer, with river water, and soil,* (soyle,) in part of all that was specified in the said indenture," &c. As to the other, he says that a few days after they went to the south side of Apoquimining creek, by computation

beyond the twelve miles, and there made livery of seizin of the lower part. The distinction thus made it may be necessary hereafter to refer to.

From a book kept in the government at New York, begun in 1682 and ending in 1683, a copy has been produced of an entry, or paper, of course made during that period, from the commander and council, beginning thus: "The record of the commander and council; declaration on Esquire Penn's grant for Newcastle, St. Jones and Whorekills, by the commander and chief, in council." It then proceeds to recite the two deeds from the duke of York to Mr. Penn, of the 24th August, 1682, setting out, at large, and accurately, the description in each; states the appointment of attorneys to deliver free and actual possession, and adds: "as by the said indentures here produced, and shown to us, and by us well approved and entered in the public records of this province, doth and may more at large appear, and we being thereby fully satisfied of the said William Penn's right to the possession and enjoyment of the premises." The paper, which is addressed "to the several justices of the peace, magistrates and other officers, at Newcastle, Saint Jones, Deale, also Whorekill, at Delaware," or within any of the bounds and limits above mentioned; and then, after thanking them for their good service, during the time they had remained under his royal highness's government, dismiss them, "expecting no further account than that you readily submit and yield all due obedience and conformity to the powers granted to the said William Penn, in and by the said indentures, in the performance of which we wish you all happiness."

John Moll, in the certificate before mentioned, after stating the livery of seizin already referred to,

adds this statement: "Which acting of us was fully accepted and well approved by Anthony Brockhold, the commander-in-chief, and his council, at New York, as appears by their declaration, bearing date the 21st November, 1682; from which jurisdiction we had our dependence all along, ever since the conquest, until we had made the above related delivery unto Governor William Penn, by virtue of his royal highness's orders and commands."

On the 28th October, 1682, as appears from evidence of record, sundry inhabitants of the town of Newcastle upon Delaware river, having heard the first of the two deeds read, and having seen the possession delivered by the duke of York's agents, "whereby we are made subjects under the king to the said William Penn," make a solemn promise, in the presence of God, to yield him obedience, and to live quietly and peaceably under his government. Soon after an act of naturalization was passed.

The objection to these two deeds, however, is, that the duke of York himself had at that time no grant for the premises from the crown, and therefore had no title to convey. It is certain that no such grant has been produced, and it is assumed, as a fact, that no formal grant had been made to him by the crown. But, if the question were open, there would be grounds for believing that the duke of York was some how empowered to deal with the territory on the west side of the Delaware river, and the river itself, as connected with the operations he was conducting to protect or recover it from the Dutch. Not that being a subject, he could acquire any right for himself by conquest, which cannot be pretended, but that in such a war, for enabling him to quiet the

inhabitants, or strengthening the defence of the country, it was not unnatural nor unreasonable to suppose that he might be entrusted with a large discretionary power, and even with rights in himself for its better execution, especially considering the relation he stood in to the king, and that he was himself the heir presumptive to the crown. John Moll says, they always "had their dependence from the jurisdiction of New York," which was the duke of York's government; and it was by that jurisdiction we have seen that the actual transfer of the powers of government was made to William Penn, which he began immediately to exercise. There is other evidence to the same effect. The duke of York and his governors did make grants along the Delaware, and did confirm titles derived from the Dutch and the Swedes. There are instances of titles beginning with the Swedes, confirmed by the Dutch, afterwards confirmed by the duke of York and his officers, and always treated with respect. But there is another transaction of those times of pubic notoriety, more important than any of these, not only on account of its magnitude, but also for the judicial interpretation it has received. In 1681, William Penn obtained his charter for the province of Pennsylvania, bounded on the east by Delaware river, from twelve miles north of Newcastle town, and on the south by a circle drawn twelve miles north of Newcastle. On the 21st August, 1682, the duke of York gave him a release of all his claim upon the province. In the recital it is stated that he "is willing and pleased to confirm and make any further assurance of the said tract of land and premises unto the said William Penn and his heirs." This deed has always been deemed a part of William Penn's title,

and, furthermore, it has been held that he took subject to grants previously made or confirmed by the duke of York's government. The Swedes held a large body of land immediately below the city of Philadelphia. The titles derived from them are still respected. They owned also the land now occupied by the city of Philadelphia. William Penn obtained it from them by exchanging lands on the Schuylkill. And yet there was no formal grant from the crown to the duke of York.

But it is unnecessary, for a reason that will presently appear, to persue this *enquiry* further. Perhaps, indeed, the duke of York by subsequently accepting a patent from the crown, and those deriving from him, if they claim under that patent, must be deemed to be concluded by it from setting up any prior title in the duke of York.

Be that as it may, the important fact deduced from what has been stated, and leading to consequences in law which will be more fully developed as the history advances, is this: that it was under these deeds, by the description and boundaries contained in them, and none other, and with the possession and seizin then delivered, that the three lower counties became, at least, de facto, a province or colony, and acquired a name and identity which they maintained thenceforward for a century, less only six years, and then, of their own will, exchanged for the higher title of a sovereign and independent State. The same community still exists after nearly three quarters of a century more, with only such modifications as it has chosen to make in the mode of its existence, and as it rightfully might make, but still preserving its identity as the same corporate body which first had

its being in the year 1682. The province was, and always continued to be, an unit.

Immediately after, the freemen began the work of government by acts of legislation. The first act (7th December, 1682) was the "act of union." In the volume of laws referred to, this act is immediately preceded by the two deeds from the duke of York to Mr. Penn, set out at large. The preamble recites the patent for Pennsylvania, and the release from the duke of York. It then goes on to set forth the two deeds from the duke of York for the three lower counties, giving in full, and accurately, the description in each, and especially in the first, the words, "as also the said river of Delaware, and soil thereof, and islands therein;" and states that the freemen of those counties have desired to be annexed to Pennsylvania. The enacting part follows, providing for the union, and for the naturalization of such of the inhabitants as were foreigners. Then follows sundry other acts of legislation in the same year, constituting the body of laws well known by the name of "the great law." They profess to be enacted by the deputies of the freemen of the province (Pennsylvania) and the counties aforesaid (the three lower counties.) The legislature was, indeed, constituted of equal numbers from the province and counties. To understand the whole bearing of this evidence, it must now be remembered that these laws were to be transmitted and delivered to the privy council in England, and, if disapproved by the crown within six months from the delivery, and so declared, were to become void; otherwise, to remain and stand in full force, "according to the true intent and meaning thereof." The "act of union" was, of course, submitted to the council, and approved by the crown. Looking at the recitals and

enactments of that act, and its preamble, it is impossible to avoid saying that the crown assented to them, thus acknowledging the validity and legal operation of the two deeds from the duke of York, the boundaries defined in them, the possession and right of possession according to those boundaries, and the rightful exercise of the powers of government under them. An existing colony was thus acknowledged as rightfully created, and lawfully enjoying the powers and privileges of a colony by known and settled boundaries; and this acknowledgment was by all who had an interest. New Jersey had none, Pennsylvania had none, the duke of York had none. The new province encroached upon none of them; Lord Baltimore asserted a claim on the land, but it was afterwards decided to be unfounded. The crown alone could object, and the crown assented. This assent, let it also be borne in mind, was not an informal and hasty one, nor upon insufficient knowledge. The king was in the exercise of his royal power, was aided by his privy council, and had full information before him of all the facts necessary to enable him to understand what he was doing. That he could, if so minded, have retracted his assent, it would be difficult to maintain. But he never did retract his assent, nor intimate any disposition to do so.

On the 22d March 1682-'83, Charles II. made a grant by patent to James, duke of York, of the same premises which had about seven months before been conveyed by the duke of York to Mr. Penn. This deed in its description is the same, precisely, as in the two deeds of the 24th August, 1682. It describes separately, and grants separately, the two parts of the lower counties exactly as in those deeds. The

only difference is, that in the former, there are two instruments; in the latter, only one.

The original patent was here produced — brought from England some years ago by the late John B. Coates, esq., (who was an agent of the Penns,) where it was given to him by John Penn, esquire, a lineal descendant of William Penn, from among the title papers of the Penn family, rather, it was understood as a thing no longer of use to him, which might gratify curiosity in Pennsylvania and Delaware, but for any other purpose. At Mr. Coates's death it went into the hands of Jacob G. Morris, esq., who has carefully preserved it, and now comes to us from the possession of Mr. Penn, with a presumption that it has been there accompanying his possession as a part of his title.

Of this deed there have also been produced various examplifications; one from the rolls in England, one from the records in Delaware, a copy, sworn to be a copy, before the lord mayor of London, in 1735, and perhaps others. It is referred to, also, in the votes of the assembly. The original, *or a sworn copy or exemplification of it* was an exhibit accompanying the bill of the complainants in the case of Penn vs. Lord Baltimore, filed in the high court of chancery of England, in the year 1735, and was in evidence in that case; and the original was offered to be, and probably was, produced.

If this deed had preceded the deeds of the duke of York, the regular derivation of the title from the crown to the lower counties could not have been disputed, and there would have been no question open but upon the construction of the terms of the patent, as to what was conveyed. But above a century ago,

in the case just cited of Penn *vs.* Lord Baltimore, the defendant set up the argument against the Penns, supposed to be derived from this order of the instruments, "that the grant to the duke being made after the deed by the duke to Penn, this grant must have been for the duke's use, and not for Penn's." The answer on the other side was, "We have a fact that will determine that case; for we have the very original charter itself, under the great seal, in our custody, ready to produce, which if the duke had intended for himself, and to defeat our title by, he would have kept, and not Mr. Penn, who was at this time of passing it, and for a considerable time longer, over in America." These things are gathered from a large folio printed book, (belonging to Thomas Gilpin, esq.,) produced on the part of the United States, which contains the pleadings and evidence in the case, and has been called by the counsel "The paper book." The case was decided by Lord Hardwicke, in 1750, and is reported in 1st Vez., 444. As the decision is deemed to be of great weight, in every aspect, and made a final end of all controversy in England, (for there never has been a dispute since,) and thus fixes a new epoch in the history of the province, it will be conducive to the right understanding of its proper bearing upon the immediate subject of controversy, to look back upon the earlier evidence which has been produced upon the hearing of the present case.

The foundation of the new province upon the basis of the deeds from the Duke of York, the exercise of legislative power, the declaration of allegiance in Newcastle, and the union with the province of Pennsylvania, all approved by the crown of England, have already been seen. The union appears to have been only a sort of a league, betraying a want of cordiality

in the beginning, and leading very soon to uneasiness and dissatisfaction; and after a few years of restlessness and irritation, they finally separated, (with Mr. Penn's consent,) in 1703. In the following year an attempt was made to bring them together again, and the people of the lower counties would appear to have been willing; but the people of Pennsylvania would not consent. From 1703, therefore, they became separate provinces, to all intents and purposes (except that the government powers and right of property in both were in Mr. Penn,) and so continued till the revolution. In this respect Judge Baldwin was misinformed, and supposed the union to have remained uninterrupted.

Very soon after the deeds, Lord Baltimore set up a claim to a large part of Pennsylvania, and to the whole of the lower counties, quite to the Delaware river, upon the allegation that they were embraced in his patent. In 1685, the council to whom the jurisdiction belonged decided against him, directing a line to be run north and south, which is the present western line of the State of Delaware. Soon after an agreement was entered into between Mr. Penn and Lord Baltimore, for settling all disputes between them.

In 1692, Mr. Penn was removed from his government, and Benjamin Fletcher was appointed by the crown. The general ground for this measure was, that disorder had occurred in his government. There was no question about title, nor was either province disturbed. They went on as before. In 1694, Mr. Penn was restored, and the government descended to his children. There has been a very general belief, that the real offence of Mr. Penn was his supposed regard

for the Stuart family, and particularly for James 2d, then banished from the throne and kingdom.

In and about the year 1711-'12, a surrender of his government powers to the crown was contemplated by Mr. Penn, and it is understood that a negotiation for the purpose was considerably advanced, when his capacity to proceed further was arrested by illness, which prostrated his mind and memory for the remainder of his life. Pending the treaty, the crown consulted the attorney general, Edward Northey, and his opinion, as reported by him, is in Chalmers's collection, page 32, dated February 25, 1711-'12. Mr. Northey, among other things, says, "and he has made out to me his title thereto," that is, to the government of Pennsylvania, and of the "town or colony of Newcastle, alias Delaware." This was in the time of Queen Anne.

In 1717, the earl of Sutherland, alleging that he was a creditor of the crown to the amount of £20,000, applied for a grant of the three lower counties. It was referred to the attorney and solicitor general, Edward Northey, before mentioned, and W. Thompson. They made an elaborate report, which is published by Chalmers, page 39, dated October 28, 1717. They heard the parties, who were before them—the earl of Sutherland on one side, and on the other, "Mr. Penn's mortgagees and other purchasers under him." Mr. Penn took no part. They state, also, that no deed from the crown was produced. For both these things they give a very sufficient reason, when they say, (p. 45,) "but they presume the said late duke of York might have some other grants thereof, which Mr. Penn might give an account of, but cannot, *'being under a lunacy.'*" Mr. Penn died in the following

year, 1718. They conclude their report by submitting for consideration, "whether it will not be reasonable that your Majesty's title should be established by the court of chancery, before any grant should be made of the premises." This was in the reign of George the 1st. The application does not seem to have been further pursued, nor was any use made of the hint about chancery on that application. The title, therefore, passed undisturbed by the crown, through five reigns and a revolution, and the province continued as it was founded in 1682, though it was always in view of the authorities of England, and as has been seen, frequently subjected to the examination of the king's legal advisers.

In 1735, William Penn being dead, a bill was filed in the high court of chancery, in England, by John Penn, Thomas Penn, and Richard Penn, his sons, against Charles Calvert, Lord Baltimore, to enforce the performance of the agreement made in the preceding century, for fixing the boundaries between Pennsylvania and Maryland, and between Maryland and the lower counties. Recurring now to the advice of Mr. Northey and Mr. Thompson to the crown, to have the question of title determined in chancery, there is no reason to doubt that this suit was allowed, if not directed, by the privy council. "It is certain," says Lord Hardwicke, replying to an objection to his jurisdiction, "that the original jurisdiction in cases of this kind, relating to boundaries between provinces, the dominion and proprietary government is in the king and council." "The king, in council, is the proper judge of the original right." He adds, that the king, in council, might look upon the agreement, and allow it as evidence of the original right, but he could not decree it as an agreement.

"And, therefore," he says, "the lords of the council have remitted this matter, very properly, to be determined in another place, on the foot of the contract." Lord Hardwicke was well aware of the questions to be decided finally in this case, as appears in the striking exordium of his judgment, "it being for the determination of the right and boundaries of two great provincial governments and of three counties, of a nature worthy of the judicature of a Roman senate, rather than of a single judge;" adding, "and my consolation is, that, if I should err in my judgment, there is a judicature equal in dignity to a Roman senate, that will correct it." No appeal was ever taken to the House of Lords.

In the decree, liberty was reserved to either party to apply to the court, if, by "any act or right of the crown," execution of it should be obstructed. This liberty was never used. No act or right of the crown was interposed.

One of the objections, among many, made by Lord Baltimore, was upon the order of the deeds—that is, that the deed to the duke of York was subsequent to his two feoffments. Lord Hardwicke lays aside the doctrine of estoppel, evidently not because it was inapplicable or insufficient in law for answering the objection, but because the expression of it was unnecessary, and perhaps inconsisent with the deference due to the crown. What his opinion was, is evident enough; for he says, "the duke being in the nature of a common person, was in a condition to be estopped." Being liberated from the restraints of the lord chancellor, we are at liberty to say, that the duke, at the date of the deeds, being a subject, was in this respect, only "a common person," and as much

bound by an estoppel as any other subject. He did not succeed to the throne till two years after. Admitting it to be true (which cannot be admitted for reasons it would take too much time now to enter into) that the king is not bound by estoppel, it would be an unreasonable and most unjust stretch of the prerogative to suppose that, when a man ascends the throne, he is liberated from all estoppels he had previously incurred as a private person. It might as well be contended that he is freed from all grants he has previously made; for the real equity of an estoppel, in such a case as this, is neither more nor less than to make the two deeds operate as one grant, and thus do plain justice between the parties. It is no subtlety nor refinement of law, but the natural dictate of common sense and common honesty. There may, perhaps, be instances of estoppel, such as from recitals and the like, which would affect a private man, and do not touch the king; and, on this account, what is now said is limited to the very case in question. The conclusion is, that the deed of 1682 was an estoppel.

But there is another answer to the objection which satisfied Lord Hardwicke, and is fully satisfactory. If there were no estoppel, and the deed of 1682 vested the legal right in the duke of York, where it remained when he became king, he was a trustee, a royal trustee, and the equity would be in Mr. Penn, or in the people of the province, it matters not which. That the king can be a trustee, would seem to be settled, whatever may have been formerly thought, from a supposed analogy to the doctrine of uses. Lord Hardwicke is authority for this, in Penn *vs.* Lord Baltimore. So is the earl of Kildare *vs.* Eustace.—1 Vern., 439. So is Burgess *vs.* Wheate.—

1 Eden., 223. Trusts have, in equity, a sort of independent existence for their own preservation. With reference to the trustee, actual confidence in the person is not essential. Hence, a corporation may be a trustee, and so may the king. Indeed, it is an established maxim of equity, that a trust shall not perish for want of a trustee. The real difficulty, in the case of the king, is about the remedy. "The arms of equity," says Lord Northington, in Burgess *vs.* Wheate, "are very short against the prerogative." Chancery, the appropriate forum of trusts, is without power, because it is said "it has no jurisdiction over the king's conscience; for that it is a power delegated by the king to the chancellor to exercise the king's equitable authority betwixt subject and subject." So said by counsel in Pawlett *vs.* Attorney General.—Hards., 468. Hence, the caution of Lord Hardwicke, in Penn *vs.* Lord Baltimore. "I will not decree a trust against the crown in this court," though he did not hesitate to declare his opinion that the king was a royal trustee. The right of the cestui que trust, however, is not questioned; nor is it questionable. There has been a suggestion that, in such cases, perhaps relief might be obtained through the exchequer, and the subject may certainly prefer a petition of right. But that is not material to the present purpose. If the right be established, no remedy is wanted; and that the equity is sufficient to raise a trust is clear, as well from what has been stated, as also from the covenant for further assurance in the deeds of 1682. There was, at all events, therefore, an equitable estate, which is quite as available as a legal estate.

This decree of Lord Hardwicke settled the validity and legal sufficiency of these deeds, the right of

the province under them, and, of course, its boundaries, as described in the deeds. No appeal was taken, nor did either party ever apply, under the reservation in the decrees, to set up any "act or right of the crown." It was universally acquiesced in, and became, by its own force and common consent, the law of the land from that time forth, till the crown of England ceased to have power either to confirm or to dispute the rights about which it was made. Now, this was the same province which had been founded, as we have seen, in 1682; these were the deeds under which it was founded; and these were the boundaries by which it had been defined from the beginning.

Twenty-four years more elapsed, without controversy or question in England, its boundaries acknowledeged by the crown, (the crown, in truth, had never disputed them,) when the delegates from "Newcastle, Kent, and Sussex, on Delaware," on the 5th September, 1774, met the delegates from the "several colonies and provinces in North America, assembled at the Carpenter's Hall, in the city of Philadelphia.—Journals of Congress, 1774. New Jersey had also delegates there, and so had Pennsylvania and Maryland, all immediate neighbors, by whom they were bounded.

As a province or colony they were received, having a definite existence under the crown of England. Such as this province was under the crown of England on that day, such was she acknowledeged to be by being received into that Congress. On that day, we have seen this colony's rights under the crown, and her boundaries, which were part of them, had stood the shocks of twenty years of controversy, and finally

were settled by a solemn decree in chancery, and rested securely and quietly upon the foundations laid in 1682. In the struggles and hazards which ensued this province took her full share. On the 4th July, 1776, she declared herself a sovereign and independent State, by the name of "Delaware," and by the united efforts of herself and her sister States was enabled to maintain it. But this State was the same that was a feeble colony in 1682, with the same metes and bounds; the same that in her more advanced age had had her metes and bounds judicially established by the high court of chancery, and, let it be added, whose boundaries had never been even questioned by the crown from the beginning, but in every way sanctioned. Could such a State, after all this, be called upon to vindicate her original rights? Lord Baltimore had a long controversy with her, because their grants interfered. But it was settled in England before the revolution. The State of Maryland has never claimed to revive it. With New Jersey there was no interference, nor is there now. New Jersey has had no controversy with Delaware, and has none at present, so far as is known. When Delaware became a State there was no subsisting controversy with any body as to her boundaries. The change which then took place was from the condition of a dependent province of the crown of England to that of an independent sovereign State, achieved by conquest. Allegiance to England was thrown off; the royal rights reserved by charter were ended, and with them the government powers of the proprietaries derived from the crown, and all their incidents. They fell together, at the same time. The blow was not struck at the proprietaries. It was aimed at the crown, and when it took effect there the subordinate

government gave way with the head it depended upon, and ceased to exist. As far as there was any derivation in the case it was, in this sense, from the crown of England; and if there had been (as there was not) an outstanding royal claim of any sort, that, according to Martin *vs.* Waddell, would have instantly become vested in the new sovereignty. From this view it follows, unavoidably, that if the deed from the king to the duke of York had never existed, but only the two deeds from the duke of York, still as the province had been founded under them, had existed upon its original foundation for nearly a century, was *de facto* a province or colony, and received as such into the union of the colonies, and was by them all declared to be a State of the Union, has been so ever since, and still is so—it would be very difficult indeed to to maintain that her limits and boundaries were not incontestably proved by those deeds, unless they interfered with some superior and better right. The *de facto* existence became a legal one, to all intents and purposes, by the affixing of her own sovereign seal, which had superseded the great seal of England, and acquired all its virtue and power. If necessary, this view might be carried even further. A colony or province, without any deed at all, would, under the like circumstances, have become a State; and if, from the 4th July, 1776, to the present day, she has been, and still is, a State of this Union, with the same rights and privileges as the other States, and there were any authentic document to prove her boundaries, (though not a royal patent or grant,) and they interfered with no other rights, it would be very difficult to impeach her title. But even if the royal consent or recognition were indispensable, it is surely to be found in the treaty of peace for Delaware as

clearly as for any other State. And now, it is proper to remark, that all the arguments urged against her upon the very question to be decided, namely, her rights in the river, the islands, and the soil, however they may profess to be restricted, have one common fault; they go too far; they prove too much. They would take away the whole right of Delaware, land, river, islands, and all. For example, one of the learned counsel has produced the charter or patent to Lord Baltimore, and insisted that it went entirely to the river Delaware. If so, and it is in force now, the whole territory of Delaware on the main land would be taken away, and nothing left but the river right, if, indeed, that could stand alone. Whereas, as has been shown, the right between them was decided in council, in 1685, the 13th of November, by fixing the present line; they entered into an agreement between them in conformity, and the specific performance of that agreement was decreed in chancery in 1750. The original right has never been open since. Judge Baldwin, on the other hand, allows her title to the main land to be good by possession, which, it is respectfully submitted, is a low and precarious ground to place the title of a State upon; but he seems to deny any right but possession, and altogther to deny it as to things which were not of a nature to be actually possessed. These objections are now too late, if they ever had any foundation at all. They were long ago decided and settled in England. They were decided and settled at the revolution; and, as to her boundaries, they stood defined and authenticated in the deeds of the duke of York, in the patent of the king, in the proceedings of council, and in the high court of chancery, never having undergone a change from what they were at the beginning.

[40]

This course of observation, however, must here be suspended for a moment to examine the construction of the deeds, as respects the immediate question upon original grounds, lest it might be supposed that they were doubtful or insufficient, or stood in need of aid, to give them a meaning they do not of themselves properly import. Upon a careful and deliberate consideration of the whole subject, and of the arguments urged against the right of Delaware, it is believed, that the deeds are quite clear. The question is, did the boundaries of the province go into the Delaware within the twlve miles circle, or did they not? The first great rule in regard to such inquiries is, that there is to be no interpretation where there is nothing that requires to be interpreted. If the words be clear in themselves, they are to be accepted. "Words," says Rutherforth, are the common signs that mankind make use of to declare their intentions to one another; and when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation.—Inst. Nat. Law., b. 2, c. 7, § 1. And for this he cites the support of Grotius.—B. 2, c. 16, § 1. This is the same rule that is laid down by Blackstone.—1 Com., 59. They all agree, too, that words are to be taken in their most usual and known signification and technical terms and terms of art, according to the interpretation of the learned in each art, trade, or science. And how can it be otherwise? Words make contracts between parties, which are to be understood in one sense by both. How can that be, unless there be a standard to be resorted to, as nearly fixed as possible, especially, in the more important transactions of life? Now, if with this single rule, any man, learned or unlearned, will read the

duke of York's deed for the upper part of the province, and that part of the king's deed which is for the same, he will be at no loss to say what it is that they grant. They are the appropriate legal words for the purpose, and evidently used skilfully and upon deliberation, and with comparatively accurate knowledge, for the New Jersey grant and the grant to Lord Baltimore, and the charter of Pennsylvania, were all prior, and there had been a long contest with the Dutch and Swedes, who had settlements and forts on the west side of the Delaware river, from cape Henlopen to the north line of the city of Philadelphia, where they had been in possession for nearly sixty years. Two of the principal were within the twelve miles circle; that is, one at Newcastle and one at the mouth of the Christiana. Besides, the words employed are the appropriate legal terms for making the grant. When the same subject comes up for judgment, the same terms are employed for describing what was granted, as may be seen in Martin *vs.* Waddell, and Munday *vs.* Arnold. The same terms were used, substantially, in patents and grants which conveyed or intended to convey navigable rivers, as in the patent to the duke of York, the grant to Lord Berkeley and Sir George Carteret, and from them to the proprietaries of New Jersey. This is still another test. If the object was to grant the river, islands, and soil, could any lawyer or conveyancer have devised, or can any one now devise, a better or even as good a form of words to accomplish it? Strike them out, and all the other purposes of the deeds, it is true, are effectuated without them. They are thus rendered surplusage. This would be an offence against another established rule of construction, which requires that all the words of an instrument should, if practicable,

be allowed to have some sense and operation. But while these words stand, it seems to be impossible that now, after more than a century and a half, any one, and particularly any third person, and, above all, a third person without right, power or interest in the subject matter of the grant at the time it was made, and for nearly a century after, can claim to have them stricken out or disregarded.

The intimation by Judge Baldwin, in his charge, that the two grants are to be so construed together as that one may control the other, so as to give them the same eastern boundary, with all respect for his learning and ability, cannot be admitted. In a legal estimate, they are not one deed, because they are two deeds; and they are not the same, because they are different. Why were they two, and why should they differ? The grantor so willed it, and he did as he willed, and as he had a right to do, in language evidently framed by learned advisers. They can well stand together, for there is no contradiction between them. If a man were to give estate A. in fee simple, estate B. in fee tail, and estate C. for life or years, it would seem extraordinary to say that he gave the same estate in all.

Nor is the difficulty overcome when the first step is taken. Admit (if it be possible) that the deeds are thus to be construed, which of them is to have the controlling power, the one that carries the boundary over to the low-water mark, on the Jersey shore, or the one that stops at the low-water mark on the Delaware side. It is apprehended that there is no legal principle to aid in deciding that question, and that in the apparent search for reasons, we should find ourselves in the region of fancy and imagination.

[43]

Of what consequence can it be what were the reasons of the king and the duke of York, or whether they had any reasons at all. Their will decided them to give what was their own, and they had a right to give. If they were not deceived in the grant, (as certainly there is no reason to believe they were,) it is wholly immaterial whether the act commended itself to other men's reason or not—whether it was wise or unwise. Neither of them has had much credit with posterity for wisdom. But this act has never been imputed to them as a crime or folly. In the most sober judgment, it must rather be deemed reasonable and meritorious. The three lower countries, at Newcastle, had a width on the land of but twelve miles, being cut off to the westward by the line between them and Lord Baltimore. They had no great navigable rivers. That line, probably running upon the summit between the Delaware and Chesapeake, where the heads of the streams were turned in opposite directions, probably left them no water communication with that great estuary and its tributaries. Their neighbors, New Jersey, Pennsylvania, and Maryland, all with extensive territories on the land, abounded also in great navigable rivers within their limits. Was it then, it may be inquired, so unreasonable to allot them as a part of their possession a little addition to their width, by giving them a part of the river, reserving only the public rights (navigation for instance) which were free and common to every subject, and now are to every citizen of the United States? Was it so unreasonable as of itself to condemn the grant, and compel a construction against the clear words to secure its condemnation? From the circle downwards, the breadth of the land increased, and did not so much demand enlarge-

ment. Besides, at the southern point where the circle strikes the water, the river begins to widen rapidly and becomes the bay, which there might be good reasons for not granting. There is nothing which seems at all unreasonable in the grant. It was made to freemen, capable of holding and enjoying it, of transmitting it to their descendants, who, in due time, asserted and maintained their right to independence, and in the conflict which ensued, and in all the duties of its more intimate union with the other States under the constitution, Delaware has contributed its full proportion of what was required for the public welfare and honor. So has New Jersey. In this respect they are equal. But who can say that it was more unreasonable or less conducive to the well being and happiness of our country, or of mankind, that it should have fallen to the lot of Delaware rather than of New Jersey, or been left to be equally divided between them.

But this can hardly be called legal argument. There is too much in it that is apart from the real question. What is the construction of the grant? Is it in any respect wrongful? These are the true questions. Both are believed to be with the State of Delaware.

Returning to the point digressed from, when the question of construction of the deeds was taken up, it is only necessary to observe that the colony of the three lower counties having been received into the Congress, became in due time a State. This was a great change. But, great as it was, it was the whole change. No one ever thought that by becoming a State, the territorial rights and possessions previously belonging to it, were reduced or altered. Where

was there a power to do either? Not, surely, in any other State. As surely, not in the Congress of the United States; and these two descriptions embrace the whole circle of acknowledged authority. When the charters of some of the States were found to include large masses of vacant land, which might be dangerous to the peace of the Union, did Congress, or either or all of the States, attempt to define or limit their boundaries? Congress invited them to make cessions, which they freely and patriotically did, by compact, and with the conditions they thought fit to insist upon and Congress to accept. The declaration of independence, from the day it was made, is thenceforth the title of every State.

What remains, then, to be considered, may be embraced in this general inquiry: Has the State of Delaware, by any act or default of her own, parted with or lost the right she then had, or any part of it?

The examination of this question must, however, be preceded by an observation no one will refuse his assent to, which, nevertheless, when fairly carried out, will be found to meet and conclusively to answer most, if not all, the objections alleged to the title of the United States, derived from the State of Delaware. It is this: that the inquiry is to be understood as applied to a sovereign State, with all the attributes of sovereignty, except such as have been yielded to the United States. Whoever would claim from her, or would claim against her, must, therefore, make out such a case as will be available against a sovereign. More clearly must it be so, if the claim be to take from her a portion of her territory, and a part of her boundaries; not to come in under her and be one of her community, but to transfer them to an alien

jurisdiction; in other words, to make them part and parcel of another State. Such is the claim made by Mr. Humphrey. The right he asserts is not under the State of Delaware, but adverse to her.

As along as the discussion was upon the boundaries of the respective States, every argument which conduces to show the right to be in one rather than the other, is fairly applicable and entitled to respectful attention, which they have accordingly received. But the moment that point is settled, *and the boundaries established,* all within the line on the respective sides is part of the territory of the one it is adjudged to, and is subject to her exclusive sovereign jurisdiction. To her alone belongs the rightful power to govern and make laws for it, without interference by the United States, or by any State. That there was a dispute about boundaries, was a good reason for settling it; but none for holding it less the territory of the State after the dispute is settled, than any other part of her possessions. No one, for example, would affirm that what fell into Maryland or Delaware by fixing the line between them, or between Pennsylvania and Maryland, or between Pennsylvania and Virginia, is less within their jurisdiction than any other portion of the territories of those States. Wherever their limits are, up to that line, their law making power extend and governs. This principle, believed to be undeniable, applies in full force to the present case. If it has been necessary, for the purpose of deciding the controversy about the Pea Patch, to determine, incidentally, the question of the boundaries of the two States at that part of the river, (and it has been so argued on both sides,) and it has been determined that the island is within the territory of Delaware, it must follow that the island

is also within her sovereignty; and whoever puts his foot upon it, is subject to her laws just as much as if he resided in Newcastle or in Wilmington. Whoever would seek to recover it at law, must go into her courts, including in that description the circuit court of the United States, where there are proper parties; a court established for administering the laws of the State, in civil cases, where one of the parties is an alien, &c., of another State, or otherwise entitled to the aid of an United States tribunal; but still to administer those laws. In regard to the Pea Patch, there has been a conflict of jurisdiction. Dr. Gale brought an ejectment in the circuit court of the United States for the district of New Jersey, recovered a judgment, and obtained an execution. The United States brought an ejectment, in the district of Delaware, got a judgment, issued an execution, and the marshal of Delaware was authorized to turn out those whom the marshal of New Jersey had been authorized to put in. Records of both were produced. Both were necessarily disregarded as affecting the question now under consideration. The only thing certain about them was, that both could not have jurisdiction; and which of them had, depended upon exactly the same point as the present case turns upon, namely: whether the island was in New Jersey or Delaware. And it may also be remarked, that in one of them (Delaware) the judgment was by default; in the other, it was upon a trial essentially ex parte, with a very imperfect exhibition of evidence, by no means to be compared with what has been produced in this arbitration.

Considering it to be established that the island is within the limits of Delaware, Mr. Humphreys is to make out a title to it in one of two ways: by showing

that he has himself acquired it, in which case he must show that his acquisition of it has been under or according to the laws of Delaware; or that New Jersey has acquired it, and that her title enures to his use.

As to the first, nothing has been alleged but possession. By the laws of Delaware, possession does not avail against the State. The statute of limitations, between individuals, is truly said to be a law of peace. An exception to it, in favor of States, or a considerable extension of time in their behalf, may be as truly said to be a law of necessity; for States cannot occupy, as individuals, so as to have an actual manifest possession, which is notice; nor can they apply the same vigilance which is reasonably required of private proprietors. It is not necessary to dwell on this. Actual possession there has not been. His honor, the late Judge Baldwin, says, that by the survey of 1784, and its acceptance by the proprietaries, the Messrs. Hall, and Dr. Gale under them, stood in the place of the west New Jersey proprietaries, with all their rights. "His legal seizin or possession," continued for 31 years, till 1815, would bar the right of entry of any adverse claimant. Had the right been in the proprietaries, and the island within New Jersey, the legal seizin or possession, as before stated, would have accompanied the grant. But neither part of the postulate is correct. The proprietaries had no right, as has been seen, and the island was not within New Jersey. When Dr. Gale, or some one claiming under him, obtained the title of the State, in 1831, he could get no legal seizin, for one of the reasons already stated; and for this additional one, that the United States were then in actual adverse possession.

Thus, then, there was no legal seizin of possession. That there was no actual possession under the survey, worthy to be so called, or to found a right upon, seems to be an unavoidable inference from the evidence. The survey could not have been made on the ground. Its date, 1784, is near the time when the island was about the size of "a man's hat," and overflowed every high tide. There was no resting place upon it for the surveyor's foot or his instrument. But there is something else, much more conclusive. The surveyor returns the contents to be 178 acres. More than fifty years afterwards, when the island had been growing all the time, it contained by accurate measurement, only 87.60 acres. The surveyor, therefore, did not begin a possession, though he made a sufficient survey, if the proprietaries accepted it, as they certainly did. No survey, indeed, was necessary, for an island is sufficiently defined by the waters. The only other evidence of possession is, that in the spring of 1813, April or May, Doctor Gale took down a large party of men. The witness who proved it was one of the company. He said they went there to fish, and it was stated that Doctor Gale had in view to clear a fishery, but it did not answer, on account of the strength and direction of the currents, which swept the net into deep water and let the fish escape. They found upon the island a rough frame house, recently erected, (probably by Doctor Gale,) of one story in height, with one room in it, and no chimney or fire-place. They used, for cooking, a stove they carried down in a boat, and brought away with them. They left the island in August, and, as far as appears, never returned. What became of the house is not in proof. The occurrence just related was after the military officers of the United States had fixed their

attention upon the spot as a site for a defence of the river. About the same time, General Bloomfield, who was in command of the military district, went to Delaware to negotiate a cession of the island to the United States, being himself a citizen of New Jersey, and having been her governor and ex-officio chancellor, and, it is reasonable to suppose, acquainted with her rights. In December, 1814, Captain Clarke, of the United States topographical engineers, under orders from the War Department, taking with him one hundred soldiers and some thirty or forty workmen, and the frame of a block house, went upon the island to commence the work of a fortification, and remained there till June, 1816. He states that there was nobody on the island when he went there, nor any building or "vestige" of one, and that nobody was there during his stay but those under his command. From the survey, then, 'till 1816, there was no possession, and from that time the United States have been in possession. The fishing visit of 1813 cannot be called a possession, and if connected with Doctor Gale's claim of title, it might be so termed for the time, still it was abandoned, leaving no mark of ownership. There was no actual possession, therefore, even if that could have been available. The evidence is that the island was occupied only by crows, selected by them as a lodging place for its solitude and security.

Has the State of New Jersey acquired any right under which his claim could be covered? If a case were established, in point of fact, it would be necessary to inquire how such a right could be acquired by New Jersey, the territory in question being within the State of Delaware, and subject to her laws and government. But it does not seem requisite to enter

upon that inquiry, inasmuch as the proofs are deemed to have made out no such case. The controversy, it will be seen, embraces two descriptions of rights, namely, the river and the soil under it, and islands in the river. The former is not susceptible of actual possession—the latter are. To begin with the latter. The evidence is, that within the twelve miles circle, before the Pea Patch made is appearance, there were only two islands, (so called,) Reedy island and Bombay Hook. They have both been in the possession and under the jurisdiction of Delaware. Bombay Hook, it is believed, cannot with propriety be called an island in the river. It lies within the line of the main land of Delaware, above the low water mark of the river, and has been surrounded by water only by reason of an artificial outlet being cut for Duck creek into the bay. There remains, then, only Reedy island. It may be said that it lies nearest to the Delaware shore. But it was in the river, and if the right to the river and islands was in the crown, while Delaware was a province, Delaware could have had no right in Reedy island, whether it was on one side or the other of the channel. Her possession, as of right, is thus a strong proof that her title was prior to that which would have accrued to her by the devestiture of the right of the crown, and the leaving of the river vacant between two States. New Jersey had no island within the twelve miles circle.

A passage in Smith's History of New Jersey, it was thought, disclosed some right of New Jersey to an island there called Stuypson's island. The author, in giving an account of a negotiation with the Indians, says: "Also Stuypson's island, near Delaware river. Tom Store claims thirty acres," &c. The island was not found upon the map during the investigation,

being searched for in the river, though Smith's language, "near Delaware river," indicated that the distance was not from the land into the river, but from the river into the land. A close examination since has shown that it is what may be called an "inland island," formed by small streams, with, perhaps, the river on one side, but above the low water mark, and within the outline of the land, as "Bombay Hook," is on the other. It is far below the twelve miles circle, and is undoubtedly a part of New Jersey, by her original right; but not an island in the river or bay.

Something was also said about Egg island, but no evidence given. From the map, it appears to be a very small island, low down in the bay, out of the circle, lying near to the main land of New Jersey. Whether it is separated from the main, or adjoins it, by whom it is held, if by any body, and under what tenure, there is no proof in the case. New Jersey, or those claiming under her, had no island within the twelve miles.

As to the Pea Patch island, New Jersey had at no time possession, and cannot be said to have set up a right to it. The contrary is quite clear. The right asserted was that of the west New Jersey proprietaries, which, as has been seen, was adverse to the State, and could not in any way enure to her use. So of the right of Doctor Gale and those deriving from him. And when, at last, it came to be doubted whether the proprietaries had any right at all, and when the United States were in actual possession, and New Jersey was asked for an act, that act did not assert any title, but only released her right and interest, whatever it might be. Delaware, on the other

hand, was in possession, as far as a State could be. There is satisfactory evidence as to one individual residing on the island after the United States entered upon it; that he was assessed and voted in Red Lion hundred.

So much for the islands. Now as to the jurisdiction. There is no evidence to establish a single instance of its exercise by New Jersey over that part of the river and islands, and there is no reason to believe that there was one. One witness was called, to show that process from New Jersey had been once served upon the Pea Patch island, in recent times; but it failed entirely. There was no process, there was no arrest, and all that was made out was that a constable from Salem county came with a pistol, and went away without a prisoner. The ejectment in the circuit court of the United States for the New Jersey district, is of no weight. It was brought by an individual, of his own authority; it was after this controversy had begun, and for the purpose of determining this controversy.

On the part of Delaware, the evidence is full and complete of the exercise of jurisdiction over that part of the river and islands, as far back as evidence can be expected to go. The process of her courts, and of the courts of the United States sitting in that district, for the arrest of persons and property afloat, has been issued and executed, and continues so to be, quite over to the low water mark on the Jersey side; and this, not occasionally, but habitually, without doubt or question, as a matter of course, whenever applied for. Such arrests have been made of persons and property escaping from above. The cases have been contested upon every ground that ingenuity

could suggest, or the zeal of parties prompt; but there never has been an instance of any one disputing the jurisdiction in the courts, either of the State or of the Union. This must be admitted to be very persuasive evidence. In the absence of proof to the contrary, it must be deemed conclusive.

Now, this evidence comes from numerous witnesses, of great intelligence and unquestionable credit, well informed upon the subject they speak of, by their pursuits in life, and it coincides (for it did not require support or corroboration) with the proof of particular instances, both by parol and by exemplifications of records, here produced. The exhibition of the evidence at large, or even a considerable part of it, would be tedious and unnecessary. The whole was carefully reduced to writing, and will be preserved. But it is quite impossible to look at the list of witnesses without feeing unbounded confidence that, from their own experience, and from the traditions and other sources of information of the past, which lawyers and judges are obliged to explore, and to follow as their guide, we have the whole knowledge of what has been held and done from an early, perhaps the earliest, period, concentrated and condensed in this body of testimony. With nothing to contradict it, (and there is nothing), one might safely say, such has always been the law of Delaware. Kensey Johns, esquire, for example, above eighty-eight years of age, states "that he has resided in Newcastle since 1780, now sixty-seven years. He was a practising lawyer for twelve years, afterwards chief justice of the supreme court for thirty-eight years, afterwards chancellor of the State, since that time, and at present, living a private gentleman." Any one else, speaking of him, would add, and, during the whole of this

lengthened period, exercising a most wholesome influence, by example and precept, upon the mind and morals of the community he lived in. He says "it has always been considered and held by the courts, public officers and lawyers of Delaware, as far as my memory reaches, that the title and jurisdiction of the State of Delaware extended to a circle of twelve miles around Newcastle, to low water mark on the New Jersey shore. I have never heard the title and jurisdiction of the State of Delaware, over that part of the river Delaware, doubted by any court, public officer or lawyer in Delaware, on any occasion whatever. Within my knowledge and remembrance, writs have been often issued out of the courts of Delaware, to seize vessels and persons in all parts of the river Delaware, within the circle to low water mark on the New Jersey shore, and no dispute, question, or plea was ever made or suggested, within my memory, before any court in Delaware, against the title of Delaware over all such parts." And, again, "the State of Delaware, for the whole period of my remembrance, and as far back as my researches extend, has claimed and exercised jurisdiction over the Delaware river and soil thereof, within the circle, to low water mark on the Jersey shore, and the State has never failed to exercise this jurisdiction when called upon or asked to do so." Eleven other witnesses, eminent citizens of Delaware, with large means of knowledge, whose names, if repeated, would command respect for their testimony, make similar statements, and some of them give an account of particular cases of arrest and seizure, known to them personally. John Steele, also, a citizen of Pennsylvania, gives an account of his following a vessel down the river, getting process

against her from a court in Delaware, and having it executed far over on the east side of the river.

New Jersey, as before stated, never objected to the claim of Delaware, nor, as far as appears, set up any claim of her own. In 1709, the boundaries of counties were fixed by an act of the legislature. Those on the Delaware were bounded on the west by the river, the lines running along the river shore, and not into the river. In 1822, it is true, an act was passed to extend one or more of the lower counties into the river. But this was after the United States had obtained the cession from Delaware, was in actual possession, and this controversy had begun. Besides, of what avail is such an act of the legislature, except as some evidence (under the circumstances just mentioned very feeble, indeed) of a belief of right, and keeping up a claim over her own territory; a constitutional act of a State legislature, touching any part of the territory, is undoubtedly potent, and is notice to all the world. But as to territory of another State, it is inoperative, and it is notice to nobody. This act, therefore, is of no effect.

Upon all the grounds thus reviewed, the conclusion is, that the title to the Pea Patch island was in the State of Delaware. On the 27th May, 1813, that State, by an act of her legislature, ceded it to the United States upon conditions having regard to the public benefit, and not for any selfish interest of her own. No doubt can be entertained that New Jersey would in the like case, have done as her sister Delaware did, had she been free to do so. But a private claim had intervened, which she had no rightful power to dispose of; and, if it has so happened that, after a long and costly litigation, that

claim has proved to be unfounded, it is to be regretted that the claimant should have been put to useless expense and trouble; but this feeling can have no influence in determining the question of right.

By the cession of Delaware the title passed to the United States. The award, therefore, must be, and is, that the title is in the United States.

JOHN SERGEANT.

WASHINGTON, *January* 15, 1849.

Senate Document No. 21, 30th Congress, pp. 221-251. Fed. Cas. No. 18311 (30 Fed. Cas. 1123).
(1 Wallace Jr. Appendix)